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# National Court Decisions as State Practice: A Transnational Judicial Dialogue

## **Cover Page Footnote**

International Law; Commercial Law; Law

# NATIONAL COURT DECISIONS AS STATE PRACTICE: A TRANSNATIONAL JUDICIAL DIALOGUE?

*Philip M. Moremen†*

## Abstract

The creation of state practice through national court decisions can be seen as a way for national courts to play a role in transnational judicial dialogue. That is, cross-pollination between national court decisions in different countries could harmonize the law in those countries, creating consistent state practice and, hence, customary international law. This proposition, however, raises doctrinal and practical questions. Do all national court decisions that deal with customary international law qualify? Are there practical limitations to the use of national court decisions as evidence of state practice and customary law?

This article examines the status of national court decisions as state practice for purposes of the formation of customary international law. It looks at the role of national courts in both “norm creation” and “norm interpretation.” In terms of norm creation, the major doctrinal or theoretical approaches to customary international law are likely to view at least some national court decisions as state practice. Decisions of United States courts related to customary law, therefore, may be viewed by other countries as United States practice.

As for norm interpretation, consideration of foreign court decisions as state practice faces several difficulties:

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inconsistencies between courts and practice of other government branches, reliance by courts on national law versions of international law, difficulties in understanding foreign legal systems, and lack of judicial training in conducting surveys of foreign judicial practice. These problems suggest caution in the use of foreign court decisions in determining state practice, dampening the prospects of their use in transnational judicial dialogue.

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## Introduction

In international law doctrine, one element in the creation of customary international law<sup>1</sup> is state practice—the actions of states and their entities.<sup>2</sup> National court decisions almost certainly count as state practice. The creation of state practice through national court decisions can be seen as a way for national courts to play a role in what has been called a transnational judicial dialogue<sup>3</sup> between courts. That is, the cross-pollination between national court decisions may harmonize the law in participating countries, creating consistent state practice and, hence, customary international law.<sup>4</sup> This assertion, however, raises significant doctrinal and practical questions. Do all national court decisions that deal with international law qualify? Are there practical

<sup>1</sup> Customary international law means that which “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT (THIRD)]. See *infra* Part I.A. (defining the elements of customary international law).

<sup>2</sup> State practice, or usage, or repeated state acts, may take various forms. See JEFFREY L. DUNOFF, STEVEN R. RATNER, & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 74 (2002). These may include “diplomatic contacts and correspondence, public statements of government officials, legislative and executive acts, military manuals and actions by military commanders, treaties and executive agreements, decisions of international and national courts and tribunals and decisions, declarations, and resolutions of international organizations . . . .” *Id.* For a detailed discussion of state practice, see *infra* Part I.C.

<sup>3</sup> This phenomenon goes by various names in the literature, including international judicial dialogue, transjudicial communication, global judicial dialogue, transjudicialism, and constitutional comparativism. See Ronald J. Krotoszynski, Jr., “*I’d Like to Teach the World to Sing (In Perfect Harmony)*”: *International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1323 n.6 (2006) (listing variations in terminology).

<sup>4</sup> “Cross-pollination” refers to the process of courts from different countries citing back and forth to each other’s decisions.

limitations to the use of national court decisions as evidence of state practice and customary law?

The aspect of transnational judicial dialogue<sup>5</sup> relevant here<sup>6</sup> is the idea that courts refer to decisions from other jurisdictions, engaging in a dialogue and citing each other's decisions back and forth,<sup>7</sup> most often as persuasive authority.<sup>8</sup> Thus, the process goes both ways: national courts incorporate foreign precedents into their decisions (acting as "norm internalizers"), but also generate decisions that foreign courts incorporate into their jurisprudence (acting as "norm creators").<sup>9</sup>

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<sup>5</sup> See generally Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005) [hereinafter Waters, *TJD*] (considering the ways in which domestic court decisions become a part of transnational judicial dialogue); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65-103 (2004) [hereinafter SLAUGHTER, NEW WORLD ORDER] (arguing that the world operates as a complex network of government officials, including judges, who perform functions of global governance); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003) (describing how a growing community of national and international courts act in concert despite national boundaries); Melissa A. Waters, *The Supreme Court, Constitutional Courts and the Role of International Law in Constitutional Jurisprudence: Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue?*, 12 TULSA J. COMP. & INT'L L. 149 (2004) (examining views of Supreme Court Justices regarding the use of foreign legal precedents); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) [hereinafter Slaughter, *Judicial Globalization*] (describing interactions of judges that transcend borders); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) [hereinafter Slaughter, *Typology*] (describing the increasing communication between national court judges from different countries). For a critical view of the idea of transnational judicial dialogue, see generally Krotoszynski, *supra* note 3.

<sup>6</sup> More generally, transnational judicial dialogue holds that national, supranational, and international courts are developing various means of communicating and interacting with one another to the extent that they are creating an informal global community of courts. See SLAUGHTER, NEW WORLD ORDER, *supra* note 5, at 69-100 (describing five categories of interaction); Waters, *TJD*, *supra* note 5, at 493-97 (describing three categories of interaction between national courts: comparative law dialogue or cross-citation in substantive areas; development of notions of jurisdiction and comity; and face-to-face meetings).

<sup>7</sup> See SLAUGHTER, NEW WORLD ORDER, *supra* note 5, at 69-71.

<sup>8</sup> This has been most notable in constitutional cases and in other substantive areas, especially human rights. *Id.* at 66-99 (describing substantive and functional areas that reflect transnational judicial dialogue).

<sup>9</sup> Waters, *TJD*, *supra* note 5, at 494.

This interaction, or cross-pollination between national<sup>10</sup> court decisions, may, over time, harmonize the law in participating countries such that a “general and consistent practice of states”<sup>11</sup> emerges.<sup>12</sup> In other words, national court decisions may represent individual state practice and may collectively come to represent sufficient general practice to create a norm of customary law. If particular national court decisions do eventually create a customary law rule their influence could be significant.

This article examines the status of national court decisions as state practice for purposes of the formation of customary international law. It looks at the role of national courts in both norm creation and norm interpretation. In terms of norm creation, the article concludes that the major doctrinal or theoretical paradigms of customary law are likely to view national court decisions as state practice. Decisions of United States courts related to customary law, therefore, are likely to be viewed outside the United States as United States practice. Notable recent United States Supreme Court decisions that may be treated as state practice include *Hamdan v. Rumsfeld*<sup>13</sup> and *Roper v. Simmons*.<sup>14</sup>

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<sup>10</sup> The term ‘national court decision’ is synonymous with ‘municipal court decision,’ as is the term ‘national’ with ‘municipal,’ for the purposes of this comment.

<sup>11</sup> RESTATEMENT (THIRD), *supra* note 1, § 102(2).

<sup>12</sup> See Waters, *TJD*, *supra* note 5, at 526 (“judicial harmonization of state practices” through transnational judicial dialogue may lead over time to the creation of a customary law norm prohibiting the death penalty). Of course, it is unlikely that national court decisions will be the only state practice involved in the creation of a rule; the practice of other state organs will also be involved.

<sup>13</sup> 126 S. Ct. 2749 (2006). The plurality concluded that customary international law helps to define the trial protections required by Common Article 3 of the Geneva Conventions. *Id.* at 2797-98.

<sup>14</sup> 543 U.S. 551, 575-78 (2005). In its decision forbidding the juvenile death penalty, the Court did not apply customary international law explicitly, *per se*. The Court, instead, consulted international and foreign law as confirmation of its determination based on domestic law. The Court looked specifically at international treaties and at state practice, noting that only seven countries have executed juveniles since 1990 and that the United Kingdom abolished the juvenile death penalty in 1948.

The Court’s decision could be seen as constituting U.S. state practice regarding the application of the death penalty to juveniles. There may be a question whether the Court ruled as a matter of domestic law, in which case there could be an argument that its ruling is not custom-generating. There is some disagreement whether national constitutions—and perhaps, therefore, the judicial decisions construing them—constitute state practice. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (1980) (citing

When interpreters of the law—such as American courts—consult foreign court decisions as evidence of state practice various difficulties arise in relying on those decisions. The possible inconsistencies between national court decisions and state practice of other organs can make determination of a state's overall practice difficult. In addition, it may not be at all clear whether national courts are referring to international law or to domestic transpositions of international law that have little to do with international practice. It is, moreover, extremely difficult to fully understand a decision from another legal system.

All of these features compound the difficulties judges face when they act as interpreters of foreign court decisions in a transnational judicial dialogue. Judges generally lack the expertise, the language skills, and the time to conduct meaningful, comparative surveys of foreign judicial decisions.<sup>15</sup> This increases the possibility that judges will use foreign court decisions haphazardly and selectively, choosing only decisions that favor the inclinations of the interpreter. Courts and others are likely to rely on decisions that are more easily available, which will tend to be those of developed countries and those with compatible languages.<sup>16</sup>

Therefore, national court decisions can be a deceptive indication of state practice: in many ways they can mask the complexities of the generating state's legal position. This does not mean that courts and other interpreters should never resort to national court decisions as indicators of state practice or for any other reason. It does, however, suggest caution, dampening the prospects of the use of national court decisions as state practice in transnational judicial dialogue. It means that the use of foreign court decisions should be sparing and careful, and perhaps, restricted to decisions of a foreign state's highest courts.

In reality, national courts seldom conduct extensive surveys of

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provisions of national constitutions as evidence of customary law); Louis Henkin, *Human Rights and State Sovereignty*, 25 GA. J. INT'L & COMP. L. 31, 40 (1995/1996) (stating that constitutions are state practice). *But see* Anthony A. D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47, 54-55 (1995/1996) (stating that constitutions are not state practice).

<sup>15</sup> See discussion *infra* Parts II.C.2, II.C.3.

<sup>16</sup> *Id.*



state practice, instead relying heavily on the opinions of scholars<sup>17</sup> or on domestic precedent. When courts do cite to foreign decisions as evidence of state practice, they often seem to do so either as persuasive authority or without making their rationale clear.<sup>18</sup> The use of national court decisions as persuasive authority may suffer from the difficulties mentioned above and should also be employed with care. But the use of foreign court decisions as persuasive authority does not serve to establish a putative norm of customary law, which could potentially have greater effect.

## I. National Court Decisions as State Practice

This section will discuss doctrinal theories of customary international law regarding the role of national court decisions in the formation of state practice. From a doctrinal point of view, there are few compelling objections to the use of national court decisions as state practice.<sup>19</sup> Regardless of the broad approach taken to customary law—a traditional view, a modern view, or a rational choice view—national court decisions are likely to be viewed as state practice.<sup>20</sup>

The general doctrinal debate about state practice has been shaped by the orthodox positivist theorists in the early part of the last century, who largely denied any role for national courts in the formation of customary international law.<sup>21</sup> They believed that both treaties and custom resulted from the consent or intent of states so that custom was essentially a tacit form of agreement.<sup>22</sup>

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<sup>17</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 52 (5th ed. 2003). “When points of international law arise in a municipal court, and resort to the executive for guidance does not occur, the court will commonly face very real difficulty in obtaining reliable evidence, in convenient form, of the state of the law, and especially the customary law, on a particular point. An *ad hoc*, yet extensive, research project is out of the question, and counsel cannot always fill the gap . . . .” *Id.* It is ironic that courts do not refer more often to national court decisions as indications of state practice, given that national court decisions and legislation very often constitute the most easily available evidence of state practice. *See id.*

<sup>18</sup> *See infra* Part I.A.2.

<sup>19</sup> *See infra* Part I.B.

<sup>20</sup> Traditional, modern, and rational choice views are discussed *infra* Part I.A.1.

<sup>21</sup> *See* Michael Akehurst, *Custom as a Source of International Law*, 1974-75 BRIT. Y.B. INT’L L. 1, 8-10 (1977).

<sup>22</sup> *See infra* Part I.B.1.

Accordingly, only the practice of state organs competent to make treaties in the name of the state could be considered state practice.<sup>23</sup> Since that time, views about the nature of consent required for the formation of customary international law have relaxed, to say the least. Almost all the modern scholars who have addressed the question agree that national court decisions do constitute state practice.<sup>24</sup>

A separate question is the existence of restrictions on the type of acts that can be considered state practice. Some writers have distinguished between physical acts and verbal acts—including claims and unilateral declarations—and have asserted that verbal acts do not themselves constitute state practice.<sup>25</sup> These writers, however, seem to agree that at least some national judicial decisions should be considered state practice.<sup>26</sup> Still, a distinction between acts and verbal acts may be relevant in giving less weight to statements in opinions that constitute mere *dicta* or that have a minimal effect on relations between states.

#### A. Customary International Law and National Court Decisions

Decisions of national courts could contribute to the creation of international law in at least five ways.<sup>27</sup> Two of these were briefly

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<sup>23</sup> See *infra* note 83.

<sup>24</sup> See *infra* Part B.3.

<sup>25</sup> See *infra* Part I.B.1.

<sup>26</sup> *Id.*

<sup>27</sup> Three of these correspond to the sources of international law set forth in Article 38 of the Statute of the International Court of Justice. "Article 38(1) . . . is widely recognised as the most authoritative statement as to the sources of international law." MALCOLM N. SHAW, *INTERNATIONAL LAW* 55 (4th ed. 1997) (citations omitted). Article 38 provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

mentioned above: the use of national court decisions as persuasive authority and their use as state practice in the formation of custom.<sup>28</sup> In addition, national judicial decisions may be "subsidiary means for the determination of rules of law."<sup>29</sup> They may also reflect "general principles of law recognized by civilized nations."<sup>30</sup> For those who hold an expansive view of international law, national judicial decisions could constitute a source of international law rules by themselves: a transnational law or a sort of international common law.<sup>31</sup>

In order to discuss the role of national court decisions in the formation of custom<sup>32</sup> we need to know something about customary international law in general. In international law doctrine, customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation."<sup>33</sup> Thus, the definition of custom is composed of two distinct elements: (1) a general practice of states (an objective element), and (2) a sense of legal obligation (the subjective element), sometimes referred to as *opinio juris*.<sup>34</sup> This article is interested primarily in the role of national court decisions as state practice because that is their primary function and the issue that

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Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

<sup>28</sup> See *supra* pp. 261-62.

<sup>29</sup> Statute of the International Court of Justice, art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

<sup>30</sup> *Id.* at art. 38(1)(c).

<sup>31</sup> See, e.g., John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 547 (1993) ("The overall trend . . . is to hear more such cases [with an international impact] and effectively to develop what amounts to an international common law that lies in between traditional domestic and traditional international law."). See generally Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 12, 47-48 (1970) (national courts act as unofficial agents of the international legal order in rendering decisions based on international law).

<sup>32</sup> Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

<sup>33</sup> RESTATEMENT (THIRD), *supra* note 1, §102(2). Article 38(1)(b) of the Statute of the International Court of Justice phrases the requirements somewhat differently, referring to "international custom, as evidence of a general practice accepted as law."

<sup>34</sup> Short for *opinio juris sive necessitatis*. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 44 (7th rev'd ed. 1997).

raises the most discussion. The role of national court decisions as *opinio juris* is discussed briefly, below.<sup>35</sup>

### 1. *Approaches to Customary Law*

Assessing the effect of court decisions on the formation of customary law inevitably raises larger questions about the nature of customary law because different views regarding customary law may determine the role of state actions, including court decisions, in its formation. The variety of views about the nature of customary law is legion.<sup>36</sup> For the sake of simplicity and relevance, I will briefly characterize three broad approaches to customary law: traditional, modern, and rational choice.<sup>37</sup>

A “traditional” view of custom, associated primarily with legal positivism,<sup>38</sup> tends to regard state practice as the most important element.<sup>39</sup> Thus, the existence of a customary rule is determined

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<sup>35</sup> See discussion *infra*, Part I.A.2.

<sup>36</sup> Indeed, the number of different views regarding the nature of custom is related to the number of different views regarding the nature of obligation underlying all forms of international law. Oscar Schachter listed a “baker’s dozen” of theories of obligation in 1971—surely there are more now. Oscar Schachter, *Towards a Theory of International Obligation*, in THE EFFECTIVENESS OF INTERNATIONAL DECISIONS 9, 9-10 (Stephen Schwebel ed., 1971) reprinted in SOURCES OF INTERNATIONAL LAW 3 (Matti Koskeniemi, Ashgate/Dartmouth ed. 2000); see also Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1119-20 (1999) [hereinafter Goldsmith & Posner, *Theory of CIL*] (describing briefly recent theories about why states obey international law).

<sup>37</sup> See generally David Fidler, *Challenging the Classical Concept of Custom*, 39 GER. Y.B. INT’L L. 198 (1996) (providing a general description of views towards customary law and correlating them with prevailing approaches to international relations). The differences between these views have given rise to the criticism that customary law is incoherent. See *id.*; see also J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 499 (2000).

<sup>38</sup> See Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 640 (2000) [hereinafter Goldsmith & Posner, *Modern and Traditional CIL*] (discussing the association between tradition customary international law and positivism and between modern customary international law and natural law views).

<sup>39</sup> For a discussion of the traditional and modern views and their implications, see Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 149-150 (2005). See also Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 757-761 (2001) (discussing the impact of the divergence between traditional and custom and its impact on custom as a source of international law); Goldsmith & Posner, *Modern*

inductively, based on an accumulation of instances of state practice.<sup>40</sup> *Opinio juris* is of lesser significance, invoked as a secondary step in custom formation,<sup>41</sup> with variations depending on the particular doctrinal approach taken. One approach involves assessing whether states engage in particular practice from a sense of legal obligation.<sup>42</sup> This dominant approach serves to distinguish legal from non-legal practice,<sup>43</sup> separating, for example, practices followed in accordance with diplomatic etiquette from practices required by law. Another approach is to determine whether states have essentially accepted a norm suggested by state practice.<sup>44</sup>

In contrast, the “modern” view, influenced by a normative, natural law perspective sees *opinio juris* as more significant, to the extent that state practice may have little or no role in the formation of customary law.<sup>45</sup> In the modern view, *opinio juris* is derived more from what states say than from what states do.<sup>46</sup> U.N. General Assembly resolutions and declarations, ratified and unratified treaties, and declarations of international conferences

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and *Traditional CIL*, *supra* note 38 (describing the historical roots of the traditional and modern view); Kelly, *supra* note 37, at 454-55 (criticizing the “new” customary law, primarily on the grounds that it does not reflect state consent); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (discussing potential tension between the modern position and U.S. domestic law); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 325-330 (1997) (describing the impact of state practice on customary international law in a human rights context); Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995) (describing the impact of customary international law in an environmental law context); Fidler, *supra* note 37 (assessing the traditional, or “pedagogical,” perspective of customary law and comparing several modern perspectives).

<sup>40</sup> See Roberts, *supra* note 39, at 758.

<sup>41</sup> See *id.*

<sup>42</sup> See MALANCZUK, *supra* note 34, at 44.

<sup>43</sup> See Roberts, *supra* note 39, at 758.

<sup>44</sup> See ANTHONY A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 66-71 (1971) [hereinafter D’AMATO, CONCEPT].

<sup>45</sup> See Goldsmith & Posner, *supra* note 38, at 640 (new customary law is “colored by a moralism reminiscent of the natural law view.”); Roberts, *supra* note 39, at 758-59 (modern custom is derived through a deductive process, emphasizing *opinio juris* and de-emphasizing state practice).

<sup>46</sup> See Goldsmith & Posner, *supra* note 38, at 640; Roberts, *supra* note 39, at 758-759.

can all contribute to the creation of *opinio juris* and, hence, to customary international law.<sup>47</sup>

Of course, these descriptions of the traditional and modern views represent ideal types and many scholars hold a mix of views. Scholars in both schools speak in the language of traditional customary law, justifying their analysis of custom in terms of the classical formulation of custom as state practice and *opinio juris*. The modern school, in a sense, is simply pouring new wine into old bottles.<sup>48</sup> Nonetheless, the essential distinction between the two approaches is clear.

The rational choice approach to customary law employs the assumptions of rational choice and insights from game theory to assess state behavior that seems to comply with customary law.<sup>49</sup> Professors Goldsmith and Posner are the most notable exponents of this approach, which they have described in a series of works,<sup>50</sup> sparking responses and further scholarship in the area from a

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<sup>47</sup> See Roberts, *supra* note 39, at 758-759 (discussing multilateral treaties, General Assembly resolutions); see also Kelly, *supra* note 37, at 484-85 (discussing declarations of international forums); Goldsmith & Posner, *Modern and Traditional CIL*, *supra* note 38, at 640 (discussing ratified and unratified treaties, General Assembly resolutions, and international commissions).

<sup>48</sup> See Schachter, *supra* note 36, at 12 (stating that lawyers are made uncomfortable because not all normative processes can easily be placed into traditional categories of treaty and customary law, and so they attempt to treat these new processes as if they were part of the more traditional categories). Some scholars who hold a strong version of the modern position have asserted that this approach simply represents a new form of international law-making, rather than a new type of custom, focusing on the consensus views of the international community. See Jonathan I. Charney, *Universal International Law*, 97 AM. J. INT'L L. 529, 543-45 (1993) (suggesting that the results of multilateral forums may not conform to traditional customary law but may reflect an evolution in the international law-making process); see also Bodansky, *supra* note 39 (critiquing this development). See generally Hiram Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87 (1991) (arguing for standards to distinguish customary international law and declarative international law).

<sup>49</sup> See Guzman, *supra* note 39, at 131-33.

<sup>50</sup> The series includes the following: JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) [hereinafter *LIMITS*] (collecting and updating analysis from previous articles); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective* 31 J. LEGAL STUD. S115, S124 (2002); Jack L. Goldsmith & Eric A. Posner, *Further Thoughts on Customary International Law*, 23 MICH. J. INT'L L. 191 (2001); Goldsmith & Posner, *Theory of CIL*, *supra* note 36; Goldsmith & Posner, *Modern and Traditional CIL*, *supra* note 38.

number of other scholars.<sup>51</sup> In the Goldsmith-Posner view, states cooperate in some very limited circumstances, which rational choice theory can help to explain.<sup>52</sup> That cooperation is due to calculations of state interest and is unsteady, subject to the changing winds of those interests.<sup>53</sup> Thus, the sense of legal obligation embodied in the notion of *opinio juris* is not relevant to state behavior.<sup>54</sup> Similarly, the rational choice view reduces the significance of state practice<sup>55</sup> and would seem to eliminate the significance of state consent in the formation of custom.<sup>56</sup> Both traditional and modern views of customary international law, moreover, suffer in the rational choice view: neither is realistically based on state consent; both are substantively vague; and, most

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<sup>51</sup> See generally Guzman, *supra* note 39 (discussing the alternative of a rational choice framework for customary international law); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005) (taking an expansive view of rational choice theory to explain customary international law); Mark A. Chinen, *Game Theory and Customary international Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001) (arguing rational-choice game theory says nothing about whether customary international law is a valid theory of law); Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 VA. J. INT'L L. 839 (2002) (applying a rational choice, game-theoretical approach to the law of state responsibility); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002). An earlier assessment of rational choice approaches to treaty and custom from an ethical perspective can be found in FERNANDO R. TESON, A PHILOSOPHY OF INTERNATIONAL LAW 73-103 (1998) (discussing and critiquing rational choice approaches to international law on ethical grounds).

<sup>52</sup> See LIMITS, *supra* note 50, at 10-13.

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., LIMITS, *supra* note 50, at 10-13. Most of those responding to Goldsmith and Posner have done so in rational choice terms. Several scholars argue that rational choice is capable of explaining deeper cooperation than Goldsmith and Posner suggest, and they dispute Goldsmith and Posner's stark distinction between rational and normative behavior, arguing that rational motivation for behavior does not negate the legal nature of customary law. See Guzman, *supra* note 39, at 118 (considering how a rational choice model makes customary international law more workable); Norman & Trachtman, *supra* note 51 at 541 (examining treaty compliance in the context of rational choice). See generally Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defence*, 15 EUR. J. INT'L L. 1031 (2004) (arguing the existence of a normative pull to compliance and disputing the applicability of Goldsmith & Posner's examples).

<sup>55</sup> See Guzman, *supra* note 39, at 153-57.

<sup>56</sup> See Goldsmith & Posner, *Theory of CIL*, *supra* note 36, at 1119-20 (dismissing positivist consent theories).

importantly, both are better explained through a rational choice analysis of state interests.<sup>57</sup>

Of these three general approaches to custom, the only one that seems to contest the role of national court decisions in forming customary law is the traditional school, for two reasons. First, the traditional school relies on state practice rather than statements, and there may be some question whether judicial decisions constitute state practice or mere declarations of law. Second, and more important, the traditional school rests on positivist notions of state consent, which, in their strong form, might require state action by the executive.

The modern school seems to accept national court decisions as indicative of custom<sup>58</sup> and, as a matter of theory, would not seem to have difficulty with national court decisions as a constituent of customary international law. The modern school includes a broader range of statements and declarations within state practice.<sup>59</sup> The modern school is also likely to treat national court decisions as expressions of *opinio juris* and be less concerned about the existence or nature of state practice at all.<sup>60</sup>

Rational choice scholars, such as Goldsmith and Posner, would appear to accept national court decisions as state practice. This may be because, from the rational choice perspective, state consent is not relevant. Goldsmith and Posner explicitly state that "[n]othing within rational choice mandates the particular domestic arrangement by which a nation pursues its self-interest in connection with CIL, and it is consistent with the theory that a nation would commit itself to certain courses of action by judicial enforcement."<sup>61</sup> Thus, they say, although competence and accountability reasons suggest that states would rather have

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<sup>57</sup> Goldsmith & Posner, *Modern and Traditional CIL*, *supra* note 38, at 666-71.

<sup>58</sup> See Kelly, *supra* note 37, at 505-06 (describing and criticizing modern school treatment of national court decisions as state practice).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Goldsmith & Posner, *Modern and Traditional CIL*, *supra* note 38, at 665. In any event, in the United States the courts almost always defer to the executive's view of CIL. Elsewhere, Posner and Goldsmith suggest that, in the absence of political branch guidance, courts may be, in effect, deputized as the determiners of the national interest with respect to customary international law. Goldsmith & Posner, *Theory of CIL*, *supra* note 36, at 1169-70.



political branches determine the national interest regarding customary international law, rational choice theory does not demand such a choice.<sup>62</sup>

## 2. *National Court Decisions and the Subjective Element of Custom*

Although state practice is the most significant role national court decisions can play in the formation of customary international law, national court decisions could also constitute evidence of the subjective element of custom. A thorough treatment of this topic is beyond the scope of this article. Nevertheless, the identification of a few salient issues is in order.

There are at least two main variants of the subjective element.<sup>63</sup> The dominant approach has been to require that state practice arise out of a sense of legal obligation,<sup>64</sup> sometimes called *opinio juris*.<sup>65</sup> The primary rationale for this requirement is that there must be some way to distinguish legal rules from practices followed due to some other motivation, such as courtesy, comity, or other non-legal considerations.<sup>66</sup> Another approach has been to view the subjective element as a requirement for at least some degree of consent by states to the formation of a customary law rule.<sup>67</sup> This view may be reflected in the definition of custom in Article 38 of the I.C.J. statute: state practice must be “accepted as

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<sup>62</sup> Barton & Carter, *supra* note 31, at 665-66.

<sup>63</sup> See Int'l L. Ass'n, Comm. on Formation of Customary (Gen.) Int'l L., *Statement of Principles Applicable to the Formation of General Customary International Law* 30 (2000), available at <http://www.ila-hq.org/pdf/customaryl原因.pdf> [hereinafter *ILA Report*].

<sup>64</sup> See *id.*; see also SHAW, *supra* note 27, at 66, 67.

<sup>65</sup> One interpretation of this requirement is a “belief in the legal permissibility or (as the case may be) obligatoriness of the practice.” *ILA Report*, *supra* note 63, at 33.

<sup>66</sup> *Id.* at 6.

<sup>67</sup> See *id.* at 30; see also KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 44-51, 61-64 (2d ed. 1993). The strong version of this voluntarist approach, associated with orthodox positivism, would require every state bound by a rule of custom to have individually agreed to it. See discussion *infra*, I.B.1. A looser consent requirement could be satisfied by tacit consent, or even by acquiescence. See *id.* An even looser conception of state consent might be described in the following way: some states actively create a practice, some by initiating it, some by imitating it, and others by acquiescing in it; other states may have done nothing but find themselves bound by the emerging rule. See *ILA Report*, *supra* note 63, at 39.

law.”<sup>68</sup>

A national court decision could satisfy the subjective element in several ways. A court's decision that describes the approach of its state in dealing with a customary law issue would constitute very clear evidence of a state's acceptance of a rule. Whether a national judicial decision itself satisfies the subjective element of custom is a more complicated issue and may depend on which conception of the subjective element one adopts.<sup>69</sup>

If we view the subjective element as a sense of legal obligation, then almost any national judicial decision applying a rule of customary international law may qualify in the sense that a court necessarily believes it has reached its decision out of a sense of legal obligation.<sup>70</sup> It may be difficult to tell, however, whether this sense of legal obligation derives from international law, from domestic law, or from a domestic auto-interpretation of international law.<sup>71</sup> If the subjective element must reflect state consent, whether national decisions qualify may depend on whether the judiciary is capable of indicating consent on behalf of a state. Even under a relaxed notion of consent, it may be that some form of consent to a particular rule is required by some number of states in order to begin creating a customary rule.

### *B. Doctrinal Views of National Court Decisions*

This section assesses doctrinal views regarding the status of national court decisions as state practice. The analysis follows the classical paradigm—assessing national court decisions in terms of state practice and *opinio juris*. This is still the dominant framework for discussing customary law, even for most of the

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<sup>68</sup> I.C.J. Statute, art. 38(1)(b).

<sup>69</sup> Note that we are discussing here a particular state's satisfaction of the subjective element regarding its own state practice, not whether the subjective element has been satisfied for states in general. See *ILA Report*, *supra* note 63, at 30.

<sup>70</sup> See 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE §10, at 26 n.6. (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM] (indicating that judicial decisions provide their own indication of acceptance as law).

<sup>71</sup> See Anthony A. D'Amato, *A Reformulation of Customary Law*, in INTERNATIONAL LAW ANTHOLOGY 65, 65-66 (Anthony A. D'Amato, ed. 1994). D'Amato comments that “without this objective element of internationality, one could not tell whether the rule articulated would pertain to states in their international relations.” *Id.* at 67.

scholars who subscribe to the modern view.<sup>72</sup> Even rational choice scholars, who are focused on rational choice explanations of custom, dispute the classical paradigm refer to its concepts and employ its vocabulary.<sup>73</sup>

### 1. *The Historical, Positivist View*

Positivist writers in the late nineteenth and early twentieth centuries—a time in which positivism was the dominant school<sup>74</sup>—largely denied any direct law-creating effect to national court decisions.<sup>75</sup> According to their rigid dualism, national law was incapable of becoming a source of international law directly, either in the form of national legislation or judicial decision. In addition, international law rested on sovereign consent, and only the executive, perhaps also the foreign ministry, was capable of exercising premeditated consent.

For orthodox positivist theorists such as Triepel and Anzilotti, these conclusions followed from their conception of the international legal order.<sup>76</sup> In their view, only the common will of

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<sup>72</sup> See e.g., *ILA Report*, *supra* note 63, at 32-34.

<sup>73</sup> See, e.g., *LIMITS*, *supra* note 50, at 23-82

<sup>74</sup> See ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS*, 232, 236 (rev. ed., 1961); see also Symposium, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 100-01 (1997). From a somewhat revisionist perspective, Professor Kennedy argues that orthodox positivism was not as dominant in the late nineteenth century as has been thought. Rather, the “orthodox” view was, in part, the creation of scholars who have since sought to react against the positivist view. *Id.*

<sup>75</sup> See Akehurst, *supra* note 21, at 8-10.

<sup>76</sup> See generally CARL HEINRICH TRIEPEL, *VOLKERRECHT UND LANDESRECHT* (1899) [French translation *DROIT INTERNATIONALE ET DROIT INTERNE* (1920)]. Triepel restates his theory more briefly in *Les Rapports entre le Droit Interne et le Droit International*, 1923-I HAGUE RECUEIL 77 (1925). See also Nussbaum, *supra* note 74, at 235. Oppenheim was more sympathetic toward the possibility that national decisions could inspire the development of custom through state practice, but essentially held similar views:

[F]or the existence of a rule, and in special for the recognition of a growing rule, of international law it is ultimately not the attitude of municipal courts, but that of the states themselves and their governments, which is decisive.... International law is a law between states, which concerns states only and exclusively; it cannot *per se* concern municipal courts, but only when it has partly or totally been incorporated into the law of the land. The attitude of municipal courts cannot therefore directly concern international law, although it

sovereign states, consciously intent on creating law, was able to produce international law.<sup>77</sup> Because national law, as evidenced by domestic statutes or judicial decisions, was derived only from the will of a particular state, it could not affect international law.<sup>78</sup> National law and international law were simply situated on different planes:<sup>79</sup> domestic court decisions reflected national law only and were not relevant to state practice.<sup>80</sup>

In addition, international law rested on the common will, or consent of states, realized through treaties or custom,<sup>81</sup> which had the effect of privileging as state practice only the activities of the state organs responsible for international relations.<sup>82</sup> Only the practice of state organs competent to make treaties in the name of the state could be considered state practice for the purpose of creating customary law.<sup>83</sup> Only these organs had the authority and the capacity (in the sense of being able to form intent or consent) to bind the state internationally—thus, only these organs actually *made* international law.

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is, as I have shown, of the greatest importance for the science of international law.

Lassa Oppenheim, *The Science of International Law*, 2 AM. J. INT'L L. 313, 339-40 (1908).

<sup>77</sup> See Nussbaum, *supra* note 74, at 235.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See Oppenheim, *supra* note 76, at 336-41.

<sup>81</sup> David Kennedy describes this model in the following terms:

Hence, positivism rooted the binding force of international law in the consent of sovereigns themselves, on a loose analogy to the private law of contract, and found the law in expressions of sovereign consent, either through a laborious search of state practice or a catalog of explicit agreements. International legal positivism is simply the working out of the private law metaphor of contract applied to a public legal order.

Kennedy, *supra* note 74, at 113.

<sup>82</sup> Luigi-Ferrari Bravo, *Methodes de Recherche de la Coutume Internationale dans la Pratique des États*, 192 HAGUE RECUEIL 237, 260-61 (1985).

<sup>83</sup> Karl Strupp, *Les Règles Générales du Droit de la Paix*, 47 HAGUE RECUEIL 263, 313-15 (1934) (conceding that a parliamentary resolution on a point of customary international law, in a democracy, uncontested by the government, could possibly develop a decisive importance); see also MALANCZUK, *supra* note 34, at 8-10 (discussing Strupp's views).

## 2. *Contemporary Views Of Consent Related To Customary International Law*

For those who reject or question the positivist notions of state sovereignty, state unity, or dualism, state consent is no longer, or never was, relevant.<sup>84</sup> They minimize the role of states or state practice in the formation of international law.<sup>85</sup> National court decisions possess legal force not so much because they reflect state practice, but because they express a sense of legal obligation—*opinio juris*.<sup>86</sup>

Even those theorists who favor some role for state consent in custom formation have moved away from the orthodox position regarding state practice towards a more relaxed view.<sup>87</sup> For these scholars, specific intent to be bound by each individual rule is not necessary.<sup>88</sup> States may actively consent to some rules and simply acquiesce to many others; sometimes state consent may be assumed to the body of rules comprising international law as a

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<sup>84</sup> See, e.g., Barton & Carter *supra* note 31, at 540-41; Charney, *supra* note 48, at 536-38. In general, commentators with a more naturalist or monist view would take this position.

<sup>85</sup> See, e.g., Charney, *supra* note 48, at 536-38.

<sup>86</sup> See Barton & Carter, *supra* note 31, at 547-48.

<sup>87</sup> A brief note in the most recent edition of OPPENHEIM reflects this change, and clearly is meant to address the orthodox positivist position, although it does not explicitly state that purpose:

Unlike in the case of treaties, it is not necessary for the creation of international custom that there should be on the part of the acting organs of the state an intention to incur mutually binding obligations; it is enough if the conduct in question, as in the case of decisions of municipal courts on matters of international law, is dictated by a sense of legal obligation in the sphere of international law. For the same reason uniform municipal legislation constitutes in a substantial sense evidence of international custom . . . . The same applies to other manifestations of the views of competent state organs on questions of international law in so far as they partake of an undoubted degree of uniformity, eg [sic] governmental instructions, state papers, etc. The difference between custom and evidence of custom is not in practice as clear-cut as may appear at first sight.

OPPENHEIM, *supra* note 70, at 26-27 n.6.

<sup>88</sup> See *id.* Some states actively create a practice, some by initiating it, some by imitating it, and others by acquiescing in it. Other states may have done nothing, but find themselves bound by the emerging rule. See ILA Report, *supra* note 63, at 39.

whole, or to the process of creating those rules.<sup>89</sup>

### 3. *The Contemporary Consensus Regarding the Role of Judicial Decisions in the Formation of State Practice*

The contemporary commentators who have addressed the status of national decisions are almost unanimous in their view that a national court deciding a case of international law engages in state practice.<sup>90</sup> With a relaxation of the consent requirement and of the rigid dualism maintained by orthodox positivists, there is no longer as strong a rationale for privileging the activities of the executive. Many commentators bolster this conclusion by an analogy to the doctrine of state responsibility.<sup>91</sup> There are difficulties with all these rationales, yet, taken collectively, they make a compelling case in favor of treating at least some subset of national court decisions as state practice.

#### *i. Relaxation of Ideas about Consent*

Under the relaxed idea of state consent that prevails today among even the traditional school, there is less reason to limit state practice to the State Department or foreign ministry.<sup>92</sup> If the active consent of states to form each particular rule or custom is not

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<sup>89</sup> See D'AMATO, CONCEPT, *supra* note 44, at 41; OPPENHEIM, *supra* note 70, at 14; MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 42-43 (4th ed., 2003). Therefore, a customary rule may be binding on a state, even though that state has not participated in its creation or explicitly acquiesced in its acceptance. OPPENHEIM, *supra* note 76, at 29.

<sup>90</sup> See, e.g., BROWNLIE, *supra* note 17, at 5 n.17 (providing the example that national court decisions provided a basis for the concept of the historic bay); OPPENHEIM, *supra* note 70, at 26; SHAW, *supra* note 27, at 78; WOLFKE, *supra* note 67, at 74, 148. For a dissenting contemporary view, see Kelly, *supra* note 37, at 506. Kelly generally takes a consent-based approach to custom, which may influence his analysis of national court decisions, although he bases his specific criticism on other grounds. *Id.* at 506-07. He argues that domestic courts generally do not "undertake a detailed analysis of state practice in other cultures, are prone to accept the values of their own culture or the political positions of their own governments as CIL, and overestimate the role of judges in the customary law process." *Id.* at 506. All of these are potentially serious, practical problems, but they are not theoretical or doctrinal reasons for rejecting national court decisions as state practice.

<sup>91</sup> See, e.g., Bravo, *supra* note 82, at 259, 284; Karl Doehring, *The Participation of International and National Courts in the Law-Creating Process*, 17 SAYIL 1, 7 (1991-1992).

<sup>92</sup> See ILA Report, *supra* note 63, at 17.

necessary,<sup>93</sup> there is no longer a need to restrict state practice to actions that supposedly evidence some sort of premeditated, collective consent. The waning of the orthodox positivists' extreme dualism also bolsters this conclusion: the actions of state organs in many instances are no longer considered to be confined entirely to the national plane.<sup>94</sup> Several related rationales for treating national court decisions as state practice derive from this starting point.

First, since many state organs play a decision-making role in foreign affairs, it simply would be unrealistic to exclude their activities from state practice.<sup>95</sup> Under this rationale, the activities of state organs, including courts and legislatures, that actually affect international affairs should constitute state practice. Domestic court decisions such as decisions concerning state immunity or the extraterritorial application of domestic law can affect international relations.<sup>96</sup> The assertion of extensive extraterritorial jurisdiction can give rise to diplomatic protests and retaliatory legislation.<sup>97</sup> In many states, national courts often share the law-making function with the executive and the legislature.<sup>98</sup>

<sup>93</sup> See *id.* at 39.

<sup>94</sup> See Doehring, *supra* note 91, at 7-8.

<sup>95</sup> [I]l faut . . . faire la place qui lui revient aussi à l'activité d'autres organes (législatifs, judiciaires, administratifs) si, pour une raison quelconque, ils ont, *en fait*, joué un rôle déterminant dans l'orientation de la pratique de l'Etat auquel ils appartiennent. On voit donc que, encore une fois, il est en réalité impossible de séparer totalement l'aspect international de l'aspect national des problèmes.

Bravo, *supra* note 82, at 260 [It is necessary to place due importance to the activity of other organs (legislative, judicial, administrative) if, for whatever reason, they have, *in fact*, played a determining role in the orientation of the practice of the state to which they belong. One sees, therefore, that, yet again, it is in reality impossible to separate totally the international aspect of problems from the domestic aspect.] (author's translation; emphasis in original).

<sup>96</sup> *ILA Report*, *supra* note 63, at 18.

<sup>97</sup> See *id.*; JANIS, *supra* note 89, at 329-30 (describing British responses to U.S. assertions of antitrust jurisdiction); *ILA Report*, *supra* note 63, at 18.

<sup>98</sup> See *ILA Report*, *supra* note 63, at 18 (discussing that where there is separation of powers, there are often conflicting demonstrations of state practice on the same issue). In the United States, there conceivably could be an argument that treating U.S. court decisions as state practice undermines separation of powers considerations granting the political branches primacy in the field of foreign affairs. That is, there might be an argument that the political branches, not the courts, should have control over international law-making activity of the United States. See discussion of separation of

Judicial decisions can establish legal precedent, effectively making law.

Two other related rationales are somewhat broader. One rationale is that because the subjective element of custom—acceptance as law by states—is the significant factor in the creation of customary international law, the identity of the organ that contributes to practice is not important.<sup>99</sup> What matters is whether states have accepted the rule indicated by state practice. For the same reason, the formation of intent by entities acting for the state is irrelevant for the creation of state practice.<sup>100</sup> The actions of state organs other than the foreign ministry, such as the decisions of national courts, can therefore constitute state practice.

*ii. The Analogy to the Doctrine of State Responsibility.*

Under the doctrine of state responsibility, a state is responsible for the internationally unlawful acts or omissions of its officials or state organs.<sup>101</sup> The precise position of that organ in the constitutional structure and hierarchy of the state is irrelevant.<sup>102</sup>

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powers, *infra*, Section II.A.1.

<sup>99</sup> See WOLFKE, *supra* note 67, at 58, 74. Wolfke seemingly would count national court decisions as practice, which may or may not also indicate a state's acceptance as law: "Since it is not material whose activity constitutes the practice leading to custom, it is quite natural to include judicial precedents in international practice, which, being not only acquiesced in, but often even expressly accepted by states, contribute to the formation of international custom." *Id.* at 74 (citations omitted).

<sup>100</sup> See OPPENHEIM, *supra* note 70, at 26 n.6; WOLFKE, *supra* note 67, at 58.

<sup>101</sup> BROWNLIE, *supra* note 17, at 419-22.

<sup>102</sup> See SHAW, *supra* note 27, at 541-49; Rudiger Wolfrum, *Internationally Wrongful Acts*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1398, 1400 (R. Bernhardt ed., 1995). Article 5 of the International Law Commission Draft Articles on State Responsibility provides that the conduct of any state organ having that status under internal law shall be considered as an act of the state concerned under international law, provided that organ was acting in that capacity in the case in question. Draft Articles on the Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-Third Session (Apr. 23 - June 1 & July 2 - Aug. 10, 2001), U.N. GAOR, 56th Sess. Supp. No. 10, at 92-95, U.N. Doc. A/56/10 (2001). Article 6 states that the conduct of any state organ—whether of the legislature, executive, or the judiciary—shall be considered as an act of that state, regardless of the position of the organ in the organization of the state. *Id.* at 95-98. According to Shaw, these propositions reflect customary international law. SHAW, *supra* note 27, at 548 n.47.



Accordingly, any state organ can incur state responsibility, including the judiciary, through denial of justice, for example.<sup>103</sup> Extending the analogy to state practice, the acts of all state organs—administrative, legislative, judicial, and sub-national—constitute state practice. Because the state is a single entity, there is no need to evaluate the actions of different organs differently. If the acts of specific state organs conflict with one another, it is up to national law to harmonize the conflicts.<sup>104</sup>

While there is an appealing symmetry to the analogy to state responsibility, the analogy is merely persuasive, not conclusive.<sup>105</sup> One can question the application of state responsibility to the formation of international custom. Just because a state is responsible for the wrongful acts of its organs, that does not necessarily and logically lead to the conclusion that the acts of any state organ should constitute state practice. The doctrines of state responsibility and state practice are not directly related, and there is no reason why a result in one area should control in the other.

Nevertheless, there is a conceptual connection between the concepts of state responsibility and state practice. Underlying both is the assumption of the state as a unity,<sup>106</sup> as the basic unit in an international system consisting of sovereign states. Accordingly, the only entity from which an individual or a state can seek recourse for the unlawful acts of state organs is another state.<sup>107</sup> Similarly, only state practice creates customary

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<sup>103</sup> See SHAW, *supra* note 27, at 548 n.47, (citing, *The Sunday Times Case*, 30 Eur. Ct. H.R. (ser. A) (1979), 58 Int'l L. Rep. 491, 558) (reporting that a grant of injunction by English courts blocking newspaper publication violated the guarantee of freedom of speech in the European Convention of Human Rights, Article 10). A country's judiciary might commit a breach of international law, for example, by violating general principles of orderly jurisdiction, such as denial of justice, or by the non-application or false application of a rule of international law. See Wolfrum, *supra* note 102, at 1400.

<sup>104</sup> See Doebring, *supra* note 91, at 7. National systems differ in their approach toward such harmonization. In some states, the courts are bound by the opinion of the executive in international matters; in others, the independence of the courts is guaranteed. See *id.*

<sup>105</sup> See *ILA Report*, *supra* note 63, at 17 ("It is certainly the case that the activities or organs of the State other than the executive can also engage its international responsibility; and although this is not a conclusive argument, in the present context the analogy seems persuasive." (citations omitted)).

<sup>106</sup> See Bravo, *supra* note 82, at 259.

<sup>107</sup> See generally, *International Law Commission*, *supra* note 102, at 45, 51 (the

international law.<sup>108</sup>

The concept of state unity could lead to at least two equally logical conclusions regarding what state organs speak for the state in the formation of customary law. On the one hand, we could say that the unitary state should speak with one voice, that of the executive. On the other, we could just as easily say that the voices of all state organs are equally competent to speak for the state. Neither view is inconsistent with the doctrine of state responsibility. Indeed, the orthodox positivist view of state practice described above co-existed happily in the early twentieth century with the standard view of state responsibility.<sup>109</sup>

#### 4. *Judicial Authority Citing National Decisions as State Practice*

Courts have not been troubled by doctrinal quibbles and have cited to national court decisions as evidence of state practice.<sup>110</sup> In many cases, when courts refer to national court decisions, however, they seem to do so without providing any justification, making it difficult to determine how the court is using these cases.<sup>111</sup> This silence regarding method may suggest that these courts view foreign decisions primarily as persuasive authority, or perhaps as a subsidiary means for determining international law.

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State is responsible for the actions of all of its organs and international legal consequences result in accordance with the Articles that follow).

<sup>108</sup> See OPPENHEIM, *supra* note 70, at 26-27 (citing I.C.J. Statute, Art. 38(1)(b)). As in state responsibility where the entire State is held responsible for the acts of each of its organs, in a government with separation of powers, different organs can create state practice and therefore international law. See *ILA Report*, *supra* note 63, at 18.

<sup>109</sup> See, e.g., DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 80-82 (2001) (briefly describing the history of law of the state responsibility for injury to aliens, focusing on seminal cases in the first half of the twentieth century).

<sup>110</sup> In addition, in a list issued in the 1970s, the U.S. State Department included federal court decisions as state practice, along with other governmental acts, such as treaties, executive agreements, federal regulations, and internal memoranda. *DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW, 1973 v* (Arthur W. Rovine ed., 1974).

<sup>111</sup> See LAMBERTUS ERADES, *INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW: A COMPARATIVE CASE LAW STUDY* 213-16, 229-39 (Malgosia Fitzmaurce & Cees Flinterman eds., 1993) (containing an unscientific, but extensive, collection by Judge Erades of excerpts from, or summaries of, thousands of national and international decisions dealing with a variety of international law topics).

In the United States, for example, an often-cited formulation of the evidence of customary law refers to judicial decisions without specifying their significance.<sup>112</sup>

Nevertheless, initial research confirms that courts in the United States and elsewhere sometimes explicitly refer to national court decisions as state practice. In *Paquete Habana*, for example, the Court included national court decisions in its survey of past state practice.<sup>113</sup> National courts outside the United States have also

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<sup>112</sup> The law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.” *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *see also* *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (1980) (quoting *Smith* at 60-61). For an example of a case citing this formulation see *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 438 (S.D.N.Y. 2002) (“It is well to recall that among the major sources of customary international law are judicial decisions rendered on the specific subject . . .”).

<sup>113</sup> *Paquete Habana*, 175 U.S. 677, 691-95 (1900). *See generally* *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 421-22 n.21 (1964) (surveying foreign court decisions for state practice regarding application of act of state doctrine); *Hilton v. Guyot*, 159 U.S. 113 (1895) (conducting an exhaustive survey of relevant precedents, including those found in foreign law and in foreign judicial decisions, to determine the force and effect of foreign judgments in United States courts); *Aquamar v. Del Monte Fresh Produce*, 179 F.3d 1279, 1295-97 (11th Cir. 1999) (citing “judicial decisions rendered in this and other countries” as among the sources of international law and referring to the “U.S., foreign and international courts’ custom of presuming that an ambassador has authority to speak for his or her country . . .,” but not citing specific foreign decisions among its survey of state practice); Alan Schechter, *Towards a World Rule of Law—Customary International Law in American Courts*, 29 *FORDHAM L. REV.* 313, 340-42 (1960) (surveying seven pre-1960 U.S. cases citing foreign court decisions as evidence of state practice).

Early prize cases often cited to foreign judicial decisions or foreign laws. *See, e.g.*, *The Anne*, 16 U.S. 435, 447 (1818) (citing a French case). The courts of many countries, including the United States, ostensibly followed the law of nations, rather than municipal law, in prize cases. *See* David G. Bederman, *The Feigned Demise of Prize*, 9 *EMORY INT’L L. REV.* 31, 50-51 (1995); J.H.W. VERZIJL, W.P. HEERE, & J.P.S. OFFERHAUS, 11 *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART IX-C: THE LAW OF MARITIME PRIZE*, 596-99 (1992) (national codifications of this principle). There may be some reason for caution in relying on early maritime and prize cases as precedent for the proposition that United States courts survey state practice—including foreign judicial decisions and foreign laws—in order to ascertain customary law. This is because there may be a distinction between “the law of nations”—which would include maritime and prize law—as that term was meant in the 18th and 19th centuries, and “international law,” as that term is used today. *See generally* VERZIJL, HEERE, & OFFERHAUS at 596-99 (discussing how prize courts were not bound by international law but were in fact bound by their own municipal law). The surveys of foreign laws involved in early prize and

referred to national court decisions as state practice.<sup>114</sup> At the international level, *The Lotus Case*<sup>115</sup> has been cited for the proposition that national court decisions constitute state practice.<sup>116</sup> In that case, the permanent Court of International Justice surveyed national court decisions on several points related to criminal jurisdiction, seemingly in a search for state practice.<sup>117</sup>

Some international and national decisions have cited national laws, apparently as evidence of state practice.<sup>118</sup> As state practice, acts of the legislature would seem essentially indistinguishable from acts of national courts. If national laws constitute state practice, so should national court decisions, and vice-versa.

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maritime cases may have been searches for what we would now call general principles of law, rather than surveys of customary state practice. See Alfred P. Rubin, *U.S. Tort Suits by Aliens Based on International Law*, 18 FLETCHER FORUM OF WORLD AFFAIRS 65, 71-72 (Summer/Fall 1994). Nevertheless, at least by the time of *The Paquete Habana*, the courts' exploration of the law of nations seems more like a survey of state practice in search of custom. Indeed, the Court in that case said it was searching for "international law," not the law of nations. *Paquete Habana*, 175 U.S. at 700.

<sup>114</sup> See, e.g., ERADES, *supra* note 111, at 213-14 (citing Qureshi v. U.S.S.R., 64 I.L.R. 585, 597-602 (Pak. Sup. Ct., 1981), and Dralle v. Czechoslovakia, 17 I.L.R. 155, 157-58 (Aust. Sup. Ct., 1950)).

<sup>115</sup> S.S. "Lotus," 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

<sup>116</sup> See, e.g., *ILA Report*, *supra* note 63, at 6.

<sup>117</sup> *Lotus*, *supra* note 115, at 23, 26-27, 28-29. The court, however, declined to determine the role of national court decisions in the establishment of a rule of international law. *Id.* at 28. In the *Nottebohm* case, the International Court relied in part on the practice of national courts in resolving questions of conflicting nationalities, though the Court was not engaged explicitly in an examination of state practice. 1955 I.C.J. 4, 21-23 (Apr. 6).

<sup>118</sup> For international cases, see, e.g., *Nottebohm*, *supra* note 117, at 22 (relying partly on national laws regarding the determination of nationality and seeming to suggest that they constituted state practice); *North Sea Continental Shelf*, 1969 I.C.J. 3 (Feb. 20) (stating that national laws or parliamentary bills constitute state practice that could create rules of customary law concerning the continental shelf). As for national cases, Akehurst refers to several national decisions in Peter Akehurst, *Custom as a Source of International Law*, 1974-1975 BRIT. Y.B. INT'L L. 1, 9, n.7 (1977) (citing the separate opinions of judges Ammoun (at 129), Tanaka (at 175), and Lachs (at 228-29)); see also *Scotia*, 81 U.S. 170, 171-73 (1871) (discussing national laws and regulations regarding the display ships' lights); *Paquete Habana*, 175 U.S. 677, 688-700 (1900) (discussing exemption from prize condemnation of enemy fishing vessels).

### C. What Acts Constitute State Practice? Physical Acts and Verbal Acts

#### 1. In General

In trying to determine whether a particular state action, or type of state action, constitutes state practice, it quickly becomes apparent that it is necessary to have some idea of what state practice means.<sup>119</sup> In describing the element of practice in the formation of customary international law in general, some writers have distinguished between physical acts or deeds<sup>120</sup> and verbal acts,<sup>121</sup> asserting that verbal acts do not themselves constitute state practice.<sup>122</sup> The dispute over the status of verbal acts reflects a basic distinction between the traditional and modern views of custom, although even the views of more traditional scholars are a mixed bag.<sup>123</sup> The skeptical view of verbal acts probably relates to

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<sup>119</sup> See Jorg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUR. J. INT'L L. 523, 525 (2004).

<sup>120</sup> "A state sends up an artificial satellite, tests nuclear weapons, receives ambassadors, levies customs duties, expels an alien, captures a pirate vessel, sets up a drilling rig in the continental shelf, visits and searches a neutral ship, and similarly engages in thousands of acts through its citizens and agents." D'AMATO, CONCEPT, *supra* note 44, at 88.

<sup>121</sup> Verbal acts involve making statements rather than performing physical. *ILA Report*, *supra* note 63, at 14. Verbal acts are sometimes called speech acts, and may include claims, unilateral declarations, and resolutions. *Id.* More specifically, verbal acts may consist of attorney generals' opinions, pleadings in an international dispute (there are two sides to a dispute and both cannot be right), diplomatic speeches and writings, foreign office correspondence, and public mass-media speeches. See Anthony A. D'Amato, *What "Counts" as Law?*, LAW-MAKING IN THE GLOBAL COMMUNITY 83, 97 (Nicholas Greenwood Onuf ed., 1982) [hereinafter D'Amato, *What Counts?*].

<sup>122</sup> See, e.g., WOLFFE, *supra* note 67, at 41-43 (subscribing to this view, but describing situations in which verbal acts may be indistinguishable from acts of conduct and admitting a role for verbal acts in custom creation, including as evidence of the subjective element of custom); D'AMATO, CONCEPT, *supra* note 44, at 39, 51, 88-89; D'Amato, *What Counts?*, *supra* note 121, at 97, 103-07; Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1 (1977) (criticizing as without foundation the I.C.J. decision in the *Nuclear Tests* cases—*Nuclear Tests* (Australia v. France), 1974 I.C.J. 253 and *Nuclear Tests* (New Zealand v. France), 1974 I.C.J. 457—asserting the binding force of some unilateral declarations).

<sup>123</sup> In addition, the debate may highlight one of the logical inconsistencies of the doctrine of customary international law, which may undermine its legitimacy. That is, because verbal acts may constitute *opinio juris*, as well as state practice, the same

the traditional emphasis on state consent, but also boasts a separate rationale: states do not practice what they preach.<sup>124</sup> The distinction between verbal and physical acts is relevant to the status of judicial decisions as state practice in that it is possible to view domestic judicial decisions, or some subset of them, as verbal acts because they simply declare their interpretation of customary law.

The debate between professors D'Amato and Akehurst illustrates the arguments in favor of each position.<sup>125</sup> Professor D'Amato argues that verbally claimed practices should not constitute state practice for the following reasons, among others.<sup>126</sup> First, claims lack the certainty inherent in actions.<sup>127</sup> In contrast to claims, a state's acts are easily recognized.<sup>128</sup> Moreover, while a state may say many things, many of them inconsistent, it can act in only one way at one time.<sup>129</sup> Second, until a state takes enforcement action, a claim has little value as a prediction of what

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evidence could be used to satisfy both elements of custom at once, leading to "double-counting." See Kammerhofer, *supra* note 119, at 526. At least where there is no additional evidence of custom, there would be a collapse of the two elements of custom into one, creating an "epistemological circle" and rendering one of the elements of custom redundant. MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 136-41 (1999); see also Kammerhofer, *supra* note 119, at 525-29, 537-38 (discussing the views of Mendelson in Maurice Mendelson, *The Formation of Customary International Law*, 272 RdC 155, 206-07 (1999)). In addition, "a certain density and generality of conduct is required" to form a customary rule and double-counting would mean there is less density and generality of conduct. Int'l L. Ass'n, Comm. on Formation of Customary (Gen.) Int'l L., *4th Interim Report of the Committee: The Objective Element in Customary International Law*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 68TH CONFERENCE 6 (1998).

<sup>124</sup> See BYERS, *supra* note 123, at 136.

<sup>125</sup> *Id.* at 133-36; Guzman, *supra* note 39, at 125-26, 151-53 (describing the contrasting views of D'Amato and Akehurst, as well as other commentators).

<sup>126</sup> D'AMATO, CONCEPT, *supra* note 44, at 88-89; D'Amato, *What Counts?*, *supra* note 121, at 97.

<sup>127</sup> D'AMATO, CONCEPT, *supra* note 44, at 88; D'Amato, *What Counts?*, *supra* note 121, at 97.

<sup>128</sup> D'AMATO, CONCEPT, *supra* note 44, at 88; D'Amato, *What Counts?*, *supra* note 121, at 97.

<sup>129</sup> D'AMATO, CONCEPT, *supra* note 44, at 88, D'Amato, *What Counts?*, *supra* note 121, at 97.

a state will actually do.<sup>130</sup> Finally, claims often are self-serving; states make them to advance their own position, rather than to declare their objective understanding of international law.<sup>131</sup> If anything an interested party claims is evidence of international law, then international law could hardly prohibit any actions at all.

Professor Akehurst points out that in several cases the I.C.J. either treated verbal acts as state practice or looked for evidence of custom in various verbal acts.<sup>132</sup> He argues that physical acts do not necessarily produce a more consistent picture than claims or other statements.<sup>133</sup> It is “artificial to try to distinguish between what a state does and what it says,” since some verbal acts are clearly accepted as practice without a physical component, such as acts of recognition.<sup>134</sup> As for predictability, in many instances

<sup>130</sup> D’AMATO, CONCEPT, *supra* note 44, at 88, D’Amato, *What Counts?*, *supra* note 121, at 97.

<sup>131</sup> D’Amato, *What Counts?*, *supra* note 121, at 97.

<sup>132</sup> Akehurst, *supra* note 118, at 2-3, citing, *inter alia*, the *Fisheries Jurisdiction* case, 1974 I.C.J. 3, 47, 56-58, 81-88, 119-20, 135, 161 (July 25) (in which ten of fourteen judges referred to claims and protests by states in diplomatic correspondence and United Nations conferences without examining whether or not the claims had been enforced); the *North Sea Continental Shelf* cases, 1969 I.C.J. 3, 32-33, 47, 53 (Feb. 20) (treating the *Truman Proclamation* and similar claims by other states as state practice that gave rise to a rule of customary law); *Rights of United States Nationals in Morocco*, 1952 I.C.J. 176, 200, 209 (Aug. 27) (looking for evidence of custom in diplomatic correspondence and in conference records); *see also* ILA Report, *supra* note 63, at 14 (citing I.C.J. cases referring to various verbal acts, including *Gabcikovo-Nagymaros Project*, 1997 I.C.J. 7, para. 49-54, 83, & 85 (Sept. 26); *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 259-261 (July 8); *Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 14, 97-109 (June 27); *Fisheries Jurisdiction*, 1974 I.C.J. 3, 24-26 (July 25); *Nottebohm (2nd phase)*, 1955 I.C.J. 4, 21-23 (Apr. 6)).

My review of these cases reveals these verbal acts to consist of the following: practice of domestic courts in determining issues of dual nationality and domestic laws regarding nationality (*Nottebohm* at 21-23); statements by states at international conferences (*Fisheries Jurisdiction* at 24-26); statements by the parties before the Court, General Assembly declarations and resolutions, charters of regional organizations, declarations of international conferences (*Nicaragua case* at 97-109) (it is unclear whether these actions constitute *opinio juris*, practice, or both); International Law Commission draft articles and conventions adopted by the General Assembly (*Gabcikovo-Nagymaros Project* at 39-41); statements by the parties in cases before the Court (*Nuclear Weapons* at 259-61).

<sup>133</sup> Akehurst, *supra* note 118, at 3.

<sup>134</sup> *Id.*

states will act in accordance with previous statements.<sup>135</sup> D'Amato's position probably represents a minority view; the majority of contemporary commentators appear to regard verbal acts as state practice.<sup>136</sup> A number of writers have sought to harmonize the two positions by suggesting that the distinction between physical acts and verbal acts is one of weight, with physical acts carrying greater weight than verbal acts not supported by physical acts.<sup>137</sup>

## 2. *National Court Decisions as Verbal Acts*

The distinction between physical acts and verbal acts may be relevant in determining what kinds of judicial decisions constitute state practice, or in determining the weight that should be accorded to them. On the one hand, court opinions in some sense can seem like a declaration about the content of international law, a verbal act rather than a physical one.<sup>138</sup> On the other hand, a judicial decision in a matter involving international law seems like a physical act when it affects the interests of other states.<sup>139</sup>

Most commentators seem to agree that at least some national judicial decisions can be considered state practice.<sup>140</sup> Professor D'Amato has provided a useful justification for treating many court decisions as the equivalent of physical acts:

[A] domestic court does not contribute to the development of international law merely by saying that it is applying international law. But any court does more than issue an opinion; it issues a decision. The decision itself can affect international interests, and if erroneous, can lead to retaliation by the foreign state. The decision, moreover, embodies a concession for reciprocal treatment when a similar case comes

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<sup>135</sup> *Id.*

<sup>136</sup> See, e.g., OPPENHEIM, *supra* note 70, at 26; BROWNLIE, *supra* note 17, at 6; SHAW, *supra* note 27, at 64-66; *ILA Report*, *supra* note 63, at 14.

<sup>137</sup> Akehurst, *supra* note 118, at 2 n.1; SHAW, *supra* note 27, at 66.

<sup>138</sup> See *ILA Report*, *supra* note 63, at 14 (stating that judicial decisions and national legislation can be considered verbal acts); D'Amato, *What Counts?*, *supra* note 121, at 102 (addressing the view that national court decisions are equivalent to unilateral opinions).

<sup>139</sup> D'Amato, *What Counts?*, *supra* note 121, at 102.

<sup>140</sup> See, e.g., BROWNLIE, *supra* note 17, at 6 n.17; OPPENHEIM, *supra* note 70, at 26; SHAW, *supra* note 27, at 65; WOLFKE, *supra* note 67, at 74, 148.



up in a foreign nation's domestic court system. In these respects, decisions of domestic courts involving international questions directly contribute to the form of international rules by the process of custom. The decisions are acts of states containing, in the accompanying opinions, their own articulation.<sup>141</sup>

In other words, D'Amato says, a judicial decision is like a physical act—in the sense of constituting state practice—when it affects the international interests of other states or when it embodies a concession for reciprocal treatment.

Just because some judicial acts affect international interests, however, does not mean that they all do. Certainly, a court decision that expounds in *dicta* on international law should not count as state practice.<sup>142</sup> We might also think of cases that only affect the parties but do not have any international ramifications—do they count as state practice?<sup>143</sup> If they do, that comes close to

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<sup>141</sup> D'Amato, *What Counts?*, *supra* note 121, at 102. D'Amato's characterization is similar to that of the New Haven School, although D'Amato differs with the New Haven School in several respects regarding the nature of customary law. *Id.* See, e.g., INTERNATIONAL LAW ANTHOLOGY, *supra* note 71, at 89-94 (excerpting pieces by D'Amato and other scholars). Under the New Haven School approach, custom is a process of claim and response in which decision-makers assert and assess claims by one another, thereby establishing certain uniformities in expectation of behavior. Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 356 (1955) [hereinafter McDougal, *Hydrogen Bomb Tests*]. See, e.g., K. Venkata Raman, *Toward a General Theory of International Customary Law*, in TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL, 365 (W. Michael Reisman & Burns H. Weston, eds., 1976) ("[I]t is becoming increasingly clear that customary processes require decision makers who are equipped with a better cognitive map of social reality, with a more explicit conception of the intellectual tasks of decision, and, in particular, a more sophisticated notion of nonformulated communication). The conduct involved in making claims and responses may be viewed as state practice; this state practice may include the conduct of any authoritative decision-maker, including national courts. *Id.* "[D]ecision-makers . . . honor each other's unilateral claims . . . not merely by explicit agreements but also by mutual tolerances—expressed in countless decisions in foreign offices, national courts, and national legislatures—which create expectations that effective power will be restrained and exercised in certain uniformities of pattern." McDougal, *Hydrogen Bomb Tests*, at 358.

<sup>142</sup> See Bravo, *supra* note 82, at 285 (stating the necessity of distinguishing between *dicta* and positions that form the basis of a decision).

<sup>143</sup> Professor Alfred P. Rubin suggested this possibility in a conversation with the author.

saying that mere statements about the content of international law constitute state practice.

Some human rights cases in United States courts may fall into this category. Some cases may not involve government agents or may involve such low-level officials that, realistically, foreign state interests are not implicated.<sup>144</sup> In other cases, however, defendants are officials of foreign governments, major corporations, and states that sponsor terrorism, and so cases against them may involve foreign state conduct or interests.<sup>145</sup> These cases may raise foreign affairs difficulties for the United States and those foreign bodies.<sup>146</sup>

One way to resolve this issue—and to account for the blurry distinction between physical and verbal acts—is to assign less evidentiary weight to the judicial acts that resemble verbal acts. Where a judicial decision affects the interests of the litigants in a concrete way, but does not affect the interests of any state, we might attach less evidentiary weight to that decision. Where a statement in a court opinion regarding international law is mere *dicta*, we might accord it no weight.

## II. Difficulties of Considering National Court Decisions as State Practice

A number of theoretical and practical difficulties result from the treatment of national court decisions as state practice. To begin with, if the acts of all state organs can constitute state practice, there is a potential for conflict and inconsistency between the positions taken by different organs within the state. From the point of view of other states and of judicial decision-makers, such inconsistency makes determination of state practice difficult. In reality—and this is borne out in the United States—actual conflict is fairly rare.<sup>147</sup> Still, in cases of conflict, the simplest approach is to conclude that there is no determinative state practice.<sup>148</sup>

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<sup>144</sup> See Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFF. 105, 105-07 (Sept./Oct. 2000) (many defendants under the Alien Tort Statute have been small players or larger figures no longer in power).

<sup>145</sup> See *id.* at 106-15.

<sup>146</sup> See *id.*

<sup>147</sup> See discussion *infra* Part II.A.2.

<sup>148</sup> See Akehurst, *supra* note 118, at 22 (suggesting that only when the practice of

Furthermore, courts considering customary international law issues may be restricted to considering domestic law transpositions of international law, such as implementing statutes or prior judicial decisions. National court decisions, therefore, may reflect not international law but a national interpretation of international law. The result could be a court decision significantly out of step with current international law, which would limit its relevance. A potential example of an implementing statute that is a domestic law transposition of international law is the Foreign Sovereign Immunities Act.<sup>149</sup>

In addition, there are inherent difficulties in fully understanding a judicial decision from a foreign state. Several significant factors may affect the meaning of a particular decision within any particular legal system: the role of international law, the rules of procedure and jurisdiction, and the composition and status of the court. These difficulties may be compounded by a court's ineptitude in international law, foreign law, and comparative law. They may also lack the time to conduct thorough surveys of state practice. Accordingly, courts are likely to rely on decisions that are more easily available. All of these difficulties may cause courts to employ foreign court decisions selectively.

### *A. Inconsistency*

#### *1. Theory*

If the acts of all state organs can constitute state practice, there is a great potential for conflict and inconsistency. Internal inconsistency could violate the traditional requirement that for state practice to mature into a rule of customary law it must be virtually uniform, both internally and collectively.<sup>150</sup> The degree

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different organs is harmonized can consistent state practice develop).

<sup>149</sup> See ERADES, *supra* note 111, at 952 (“[A] statute like the FSIA may turn out to become a petrification of the state of international law as it existed in 1976.”).

<sup>150</sup> *ILA Report*, *supra* note 63, at 21 (“‘Internal’ uniformity means that each state whose behaviour is being considered should have acted in the same way on virtually all of the occasions on which it engaged in the practice in question. ‘Collective’ uniformity means that different states must not have engaged in substantially different conduct, some doing one thing and some another.”).

of uniformity required, however, is unclear.<sup>151</sup> The I.C.J. has required a minimum of uniformity and consistency in its decisions,<sup>152</sup> but sometimes has allowed great latitude in application.<sup>153</sup> Nevertheless, where state practice is clearly inconsistent, there can be no sufficient state practice.

The difficult cases are those in which the judiciary and the executive or the legislature have taken contrary actions or disagree about the content of customary international law. Indeed, the courts may differ among themselves. In cases of inter-branch conflict, it would be tempting to say that executive actions override others in order to resolve inconsistencies.<sup>154</sup> But, if we have rejected the orthodox positivist position that privileges the executive in foreign affairs, and have accepted that all state organs are capable of acts constituting state practice, it is difficult to accept executive primacy again through the back door.<sup>155</sup> Accordingly, the better position for a foreign observer trying to identify state practice where there is inconsistency—and certainly the most straightforward to apply—is that no state practice exists

<sup>151</sup> See WOLFKE, *supra* note 67, at 60 ("The requirement of practice being uninterrupted, consistent and continuous also no longer holds good. Everything depends on concrete circumstances. Certainly, interruptions of practice and inconsistencies in such practice often prevent the formation of a custom. This does not mean, however, that every inconsistency or break should lead to such a consequence.").

<sup>152</sup> *North Sea Continental Shelf*, 1969 I.C.J. 3, para. 73-74 (Feb. 20) ("[A]n indispensable requirement would be that within the period in question . . . state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform . . .").

<sup>153</sup> *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 98, para. 186 (June 27); *Fisheries Case*, 1951 I.C.J. 116, 138 (Dec. 18) (stating that internal uniformity need not be perfect; minor inconsistencies are acceptable). In the latter case, the Court excused some collective inconsistency in language that might also apply to internal inconsistency:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. . . . [T]he Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indication of the recognition of a new rule.

*Id.*

<sup>154</sup> See Akehurst, *supra* note 118, at 21.

<sup>155</sup> See *id.* (stating that there is no compelling reason to attach greater importance to one kind of practice than another).

under such circumstances.

Another alternative is to rely on a state's own allocation of authority in resolving inconsistencies.<sup>156</sup> When national law allocates authority over a particular area to a particular branch of government, that branch's interpretation would be accepted. In the United States, for example, determinations of sovereign immunity are assigned exclusively to the judiciary by statute.<sup>157</sup> Likewise, where a constitution provides for executive or legislative competence in the field of foreign affairs, the position of those branches might be favored on that basis.

From the point of view of other states and of those attempting to discern a consistent state practice, however, this is not an entirely satisfactory answer. How are outside observers to discern state practice when the practice of state organs is inconsistent and when the mechanism for resolving them is likely to be opaque? Accordingly, we could say that inconsistency between state organs may be seen as an internal problem for states: all national court decisions will be viewed as acts of state practice, and if states wish to avoid conflict and inconsistency, it is up to them to develop mechanisms for resolving differences.<sup>158</sup>

An illustration of the difficulties may be seen in the following example. There may be an argument in the United States that separation of powers considerations<sup>159</sup> favor an exclusive or

<sup>156</sup> Cf. Doebling, *supra* note 91, at 7 (arguing that national allocation of authority is relevant only at the municipal level and that international law imputes practice of governmental organs to the state involved).

<sup>157</sup> See 28 U.S.C. § 1604 (1976) (Foreign Sovereign Immunities Act of 1976 ("FSIA")).

<sup>158</sup> See, e.g., Doebling, *supra* note 91, at 7 ("It is a matter for municipal law to find harmonisation if the actions of the individual state organs contradict each other.").

<sup>159</sup> "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Nevertheless, the U.S. courts properly address a variety of matters involving international law. "Despite the broad statement in *Oetjen* . . . it cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)). Because of the authority of the executive, however, the U.S. courts will often defer to the executive in cases before them involving foreign affairs. RESTATEMENT (THIRD), *supra* note 1, § 112, com. c (courts give particular weight to the position of the United States government on questions of international law); see also Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Effort to Limit Human Rights Litigation*, 17

dominant role for the political branches in dealing with issues of customary international law.<sup>160</sup> This argument, however, is far from resolved. Until it is resolved, federal courts will continue to employ customary international law, rendering decisions that occasionally conflict with those of the political branches. The question of which branch is entitled to primacy when multiple branches claim competence is for United States institutions to work out. In the meantime, foreign observers trying to identify state practice cannot be expected to weigh claims about relative competence from competing institutions. Again, the simplest answer is to say that there is no uniform state practice.

Nonetheless, consistent state practice may emerge from an internal conflict over time<sup>161</sup> through from the “convergence of

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HARV. HUM. RTS. J. 169, 171-73 (2004).

<sup>160</sup> There is extensive discussion in the academic literature regarding separation of powers doctrine and application of foreign law by U.S. courts, which can only be touched on here. Professor Ku, for example, argues that the executive has primary responsibility for administering, interpreting, and applying customary international law. See Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857, 862 (2005). Accordingly, the courts should defer absolutely to executive applications of customary law. *Id.* This authority may derive from the “vesting” clause of the Constitution (U.S. CONST. art. II), vesting executive power in the President, or from the President’s general foreign affairs power. *Id.* See generally Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153 (2004) (describing functional reasons for allocating application of customary law to the executive branch rather than the judiciary). For an argument that the vesting clause grants the Executive primary foreign affairs authority, see generally Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001). But see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004). Others suggest that federal court consultation of foreign decisions treads on Congress’ lawmaking power, violating the non-delegation doctrine, or at least the policies supporting it. See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1580-82 (2003) (arguing that the delegation to federal courts of the power to apply standards of international law is problematic, especially in the context of customary international law); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL’Y 291, 298-304 (2005) (arguing that deference to foreign decisions would transfer federal power to entities outside the federal government, contrary to the constitutional structure, embodied, in part, in the non-delegation doctrine). But see Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1522-23 (2004).

<sup>161</sup> See Akehurst, *supra* note 118, at 22.

opinion between the powers that form the structure of the state.”<sup>162</sup> For example, the legislature could enact legislation countermanding a judicial decision on international law and stating its own position; this legislation, in turn, could be subject to judicial review and interpretation. It may take a while for the dust to clear in order to identify a consistent state position, and it may be difficult to tell whether the process of development is completed.

## 2. Practice

In reality, at least in the United States, national court decisions on customary international law matters do not conflict frequently with the position of the executive or the Congress, though conflicts do sometimes arise.<sup>163</sup> There are two reasons for this relative lack of conflict. First, many areas that were previously the

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<sup>162</sup> Bravo, *supra* note 82, at 261. Bravo says, in full:

[S]i le système des relations internationales doit être fondé sur le principe de la bonne foi, un problème important devient celui de la prévisibilité du comportement de l'Etat, ce qui soulève la question de la recherche d'un certain degré de stabilité de l'Etat en question. Mais la stabilité, à son tour, n'est que le point d'équilibre et de convergence d'opinion entre les pouvoirs qui forment la structure de l'Etat, telle qu'elle existe réellement, même au-delà de l'interprétation littérale de sa constitution. On voit donc l'importance d'étudier, en plus des manifestations de la pratique qui étaient chères à la doctrine positiviste, aussi d'autres éléments pour s'assurer de l'adhésion stable et fiable des Etats aux valeurs juridiques en discussion.

[If the system of international relations must be founded on the principle of good faith, an important problem becomes that of the predictability of the behavior of the state, which underlines the question of researching, to some extent, the stability of the practice of the state in question. But stability itself is nothing but the point of equilibrium and of convergence of opinion between the powers that form the structure of the state, such as they really exist, even beyond the literal interpretation of its constitution. One sees, therefore, the importance of examining, in addition to the manifestations of practice that were dear to positivist doctrine, other elements, in order to assure oneself of the stable and faithful adherence of states to the juridical values under discussion.]

*Id.* (translation by author); see also Akehurst, *supra* note 118, at 22 (“[D]ifferences between the practice followed by different organs of a state tend to disappear in time, as the views of one organ prevail over the views of others. From that moment onwards, the practice of the state becomes consistent and, thus, capable of contributing to the development of customary international law.”).

<sup>163</sup> See Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 684-86 (1986).

domain of custom—sovereign, consular, and diplomatic immunity—are largely regulated by treaty or statute, so customary law is no longer at issue.<sup>164</sup>

Second, where customary law is involved, courts are likely to follow the guidance of the executive.<sup>165</sup> In his survey of American cases involving customary international law, Phillip Trimble found comparatively few in which the court applied customary international law when the executive branch had not expressed an opinion.<sup>166</sup> Of course, in countries where there is little or no judicial independence, it is unlikely that there will be any conflict between the judiciary and the executive.<sup>167</sup>

Nevertheless, U.S. courts occasionally do resist executive direction in international law matters, even in immunity cases where there is a history of judicial deference to executive preference.<sup>168</sup> Litigants occasionally have employed affirmative claims based on customary law against the government, though generally without success.<sup>169</sup> In addition, the courts sometimes will employ customary international law to restrain executive or congressional action<sup>170</sup> through the use of custom in interpreting

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<sup>164</sup> See *id.* at 679, 688-92.

<sup>165</sup> See RESTATEMENT (THIRD), *supra* note 1, § 112, com. c (courts give particular weight to the position of the United States government on questions of international law); Trimble, *supra* note 163, at 684-87.

<sup>166</sup> Trimble states that of the more than 2,000 cases involving international law decided between 1789 and 1984, fewer than fifty involved the application of customary law when the executive had not expressed an opinion. Trimble, *supra* note 163, at 685-86.

<sup>167</sup> See RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 19-20 (1964).

<sup>168</sup> See, e.g., *Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987) (rejecting the Executive Branch's suggestion to extend head of state immunity to the Philippine Solicitor General, because he clearly was not a head of state).

<sup>169</sup> See, e.g., *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986) (not admitted aliens are not entitled under customary international law to parole revocation hearings because of contrary controlling executive and judicial acts); see also Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 480 (1998) (cases based on customary international law against the government have generally been unsuccessful).

<sup>170</sup> See Trimble, *supra* note 163, at 698 (use of the presumption against extraterritorial application of U.S. law and the *Charming Betsy* canon are "way[s] of limiting political branch authority."); Phillip M. Moremen, *National Court Decisions as State Practice*, 2000-2001 INT'L L. ASS'N, AM. BRANCH, PROCEEDINGS 154-60, 166-70



statutes and treaties,<sup>171</sup> or through the use of the *Charming Betsy*<sup>172</sup> canon and the presumption against extraterritorial application of United States law.<sup>173</sup>

There are also situations in which different branches simply take different positions in performing their functions. For example, there have been periodic differences of opinion between the courts and the executive in human rights cases under the Alien Tort Statute [ATS],<sup>174</sup> although the Supreme Court's decision in *Alvarez-Machain v. Sosa* may calm the waters.<sup>175</sup> The Executive Branch has submitted *amicus* briefs or other statements of interest in a number of ATS cases,<sup>176</sup> generally taking antagonistic or

(2000).

<sup>171</sup> See, e.g., *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981); see also Ved P. Nanda & David K. Pansius, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* § 9.5 (Thomson/West 2005).

<sup>172</sup> The *Charming Betsy* canon holds that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See *RESTATEMENT (THIRD)*, *supra* note 1, §114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."). The presumption against extraterritoriality holds that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

<sup>173</sup> In addition to using custom as a standard aid to interpretation, the courts also interpret statutes under the *Charming Betsy* canon and the presumption against extraterritorial application. See *RESTATEMENT (THIRD)*, *supra* note 1, § 114.

<sup>174</sup> 28 U.S.C. § 1350 (2004).

<sup>175</sup> The decision may not only resolve unsettled aspects of the law. The Court suggested a strong argument for a policy of "case-specific deference to the political branches." *Alvarez-Machain v. Sosa*, 542 U.S. 692, 733 n.21 (2004).

<sup>176</sup> The U.S. government has filed a number of *amicus* briefs in ATS cases, including briefs in the following cases: *Alvarez-Machain v. Sosa*, 331 F.3d 604 (9th Cir. 2003) (en banc) (opposing jurisdiction); *Doe v. Exxon Mobil Corp.*, 1-01-CV-1357 (D.C. Cir. 2003) (opposing jurisdiction); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (supporting jurisdiction); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992) (offering restrictive interpretation of the ATS) *reprinted in* 12 *HASTINGS INT'L & COMP. L. REV.* 34 (1988); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (arguing that the ATS does not provide jurisdiction over foreign sovereign); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (opposing *certiorari*); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (supporting jurisdiction). See Brief of National Foreign Legal Scholars as Amici Curiae Supporting Respondents at 3 n.4, *Alvarez-Machain v. Sosa*, 542 U.S. 692 (2004) (No.

enthusiastic positions towards human rights litigation under the ATS depending on the ideological cast of the particular administration.

Essentially, the Reagan and Bush administrations sought to overturn or limit the increasing judicial acceptance of ATS suits to remedy human rights violations.<sup>177</sup> Much of the Reagan and Bush administration arguments in these cases addressed domestic law issues of statutory construction regarding the ATS and the role of international law in federal courts.<sup>178</sup> Nonetheless, they also sometimes addressed issues related to customary international law. For example, the Bush administration disputed the ability of modern customary international law—specifically, U.N. Declarations and conventions not ratified by the United States—to create a cause of action.<sup>179</sup> In at least one case, the administration also disputed the existence and parameters of a customary law norm.<sup>180</sup>

Furthermore, there are occasions when courts differ with Congress. Perhaps the most prominent example in the United States of a legislative effort to define international law was the adoption of the “Second Hickenlooper Amendment,”<sup>181</sup> which attempted to reverse the application of the act of state doctrine<sup>182</sup>

03-339).

<sup>177</sup> See Jennifer K. Elsea, *CRS Report for Congress: The Alien Tort Statute: Legislative History and Executive Branch Views* 21-22 (Oct. 2, 2003); Stephens, *supra* note 159, at 183. The Reagan Administration reversed the Carter Administration’s position favoring ATS suits. After more favorable treatment under the first Bush and Clinton administrations, the second Bush administration attacked the ATS with a vengeance. *Id.* at 169-70.

<sup>178</sup> See Stephens, *supra* note 177, at 183.

<sup>179</sup> *Brief for the United States as Amicus Curiae in Support of Reversal of the Judgment Against Defendant-Appellant Jose Francisco Sosa* at 24-31, *Sosa v. Alvarez-Machain* 331 F.3d 604 (9th Cir. 2003) (No. 99-56880), *available at* <http://www.state.gov/documents/organization/6595.doc>.

<sup>180</sup> *Id.* at 22-29.

<sup>181</sup> Current version codified at 22 U.S.C. § 2370(e)(2) (2000). See Howard S. Schrader, *Note: Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751, 757-58 (1982); Alfred P. Rubin, *Order and Chaos: The Role of International Law in Foreign Policy*, 77 MICH. L. REV. 336, 343-45 (1979). Under the Constitution, Congress has the power to “define . . . Offenses against the law of Nations.” U.S. CONST. art. I, §8, cl.10.

<sup>182</sup> While the act of state doctrine is not a doctrine of international law, the

by United States courts. That legislation provided:

no court . . . shall decline on the ground of the federal act of state doctrine to make a determination on the merits . . . [in cases based on] . . . a confiscation or other taking . . . by an act of . . . state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection . . . .<sup>183</sup>

Congress had previously set out its version of the relevant principles of international law, including a requirement of “speedy compensation for such property in convertible foreign exchange, equivalent to the full value” of the property taken.<sup>184</sup> This was a much stronger standard for expropriating nations than United States courts had previously applied<sup>185</sup> and expressed a certainty about the international law of expropriation that did not then exist.<sup>186</sup>

The experience with the Second Hickenlooper Amendment illustrates the danger of taking legislative pronouncements related to international law at face value, without considering their application by the courts. Most U.S. courts have interpreted the amendment’s provisions regarding the act of state doctrine narrowly, confining the application of the amendment to a relatively limited class of cases.<sup>187</sup> Thus, courts will often still apply the act of state doctrine in spite of the amendment. The

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inconsistencies between Congress’ and the courts’ interpretation of the doctrine illustrates the potential for conflict between the branches in the international area.

<sup>183</sup> 22 U.S.C. § 2370(e)(2) (2000).

<sup>184</sup> § 2370(e)(1).

<sup>185</sup> See Schrader, *supra* note 181, at 758 (citing *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d. Cir. 1967), *cert. denied*, 390 U.S. 956 (1968)). In that case, heard after the adoption of the amendment, the court found that the international law issues were governed by the less stringent standards used in the case’s prior appearances in the courts, in which the courts had found a violation of international law anyway. *Farr*, 383 F.2d. at 185 (“This allows us to leave undecided whether the standard set forth in the Hickenlooper amendment differs from the standard which we applied on the former appeal, and which we now apply again.”).

<sup>186</sup> In the very case that had prompted Congress to enact the amendment, *Banco Nacional de Cuba v. Sabbatino*, the Court wrote: “There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens . . . .” 376 U.S. 398, 428 (1964).

<sup>187</sup> See GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 744 (1996).

conflict between the judiciary and legislature seems to be moving toward resolution, illustrating Akehurst's point that differences in practice followed by different organs of a state tend to disappear over time as the views of one organ tend to prevail.<sup>188</sup>

There is also a potential for conflict between the courts and Congress (to say nothing of the Executive Branch) following the Supreme Court's decision in *Hamdan v. Rumsfeld*.<sup>189</sup> The Court decided that Common Article 3 of the Geneva Conventions<sup>190</sup> applied to the conflict against Al Qaeda in Afghanistan and that, as incorporated into U.S. law, it prohibited trial by military commissions. The Court noted that the Geneva Conventions provide their fullest protections to individuals engaged in international conflicts on behalf of signatory states.<sup>191</sup> Nevertheless, the Court determined that Common Article 3 provides some minimal protection, in "conflicts not of an international character" to individuals not associated with any state who are involved in a conflict in the territory of a signatory, such as Al Qaeda fighters in Afghanistan.<sup>192</sup> In addition, Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>193</sup> The military commissions did not constitute "regulatory constituted courts."<sup>194</sup> Moreover, a plurality of the Court also determined, customary international law helps to define the specific trial protections required by Common Article 3.<sup>195</sup> The Court's decisions on these matters arguably constitute acts of state practice by the United States.

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<sup>188</sup> See Akehurst, *supra* note 118, at 22.

<sup>189</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

<sup>190</sup> The provision is common to all four Geneva Conventions; citations here are to the Third Geneva Convention for simplicity. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135.

<sup>191</sup> *Hamdan*, 126 S. Ct. at 2795.

<sup>192</sup> *Id.* at 2795-96.

<sup>193</sup> Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 190, art. 3.

<sup>194</sup> *Hamdan*, 126 S. Ct. at 2796-97.

<sup>195</sup> *Id.* at 2797-98.

As this article was undergoing revisions, however, Congress passed legislation that conflicts with some of the Court's determinations and that may constitute inconsistent acts of state practice. In the Military Commissions Act of 2006,<sup>196</sup> Congress provided the President with the authority to create military commissions to try unlawful combatants, explicitly including members of the Taliban and Al Qaeda.<sup>197</sup> In doing so Congress declared that a military commission is a regularly constituted court, providing all necessary judicial guarantees recognized by civilized peoples.<sup>198</sup> Although Congress may seem to have had the final word here, it is possible that the Supreme Court could still address these issues again under its constitutional authority.<sup>199</sup>

*B. National Courts May Consider Only Limited Sources Of Law*

One difficulty of considering national court decisions as state practice is that national courts may be constrained in their ability to refer to international law directly in making a decision. That is, they may be restricted by domestic law transpositions of international law, such as implementing statutes or, in common law countries, prior judicial decisions.<sup>200</sup> Even when statutes or judicial precedent do not dictate a court's decision regarding international law, they may significantly influence it. National court decisions, therefore, may not reflect international law but a national "auto-interpretation"<sup>201</sup> of international law.<sup>202</sup>

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<sup>196</sup> Pub. L. No. 109-366, 120 Stat. 2600 (2006).

<sup>197</sup> *Id.* § 3(a)(1) (promulgating 47A U.S.C. 948a(1)(A)(ii)).

<sup>198</sup> *Id.* § 3(a)(1) (promulgating 47A U.S.C. 948b(f)).

<sup>199</sup> See John Cerone, *The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and U.S. Law*, 10 AM. SOC'Y INT'L L. INSIGHTS (online publication), <http://www.asil.org/insights/2006/11/insights061114.html>.

<sup>200</sup> Erades notes this tendency in cases collected from many countries:

The cases collected in this section show that national courts consider earlier decisions of the court in their country as evidencing the existence of rules of international law. The majority of decisions have been delivered by courts in the common law countries. This may be an effect of the rule of *stare decisis* obtaining in these countries and obliging them to rely on precedents.

ERADES, *supra* note 111, at 213.

<sup>201</sup> See Leo Gross, *States as Organs of International Law and the Problem of*

This does not necessarily affect the conclusion that national court decisions contribute to state practice, because state practice, almost by definition, reflects a national view of international law. To the extent that courts apply a national auto-interpretation of international law, they are furthering state practice in support of that interpretation. The difficulty, however, is that domestic statutes and judicial precedent conceivably could dictate a court decision out of step with current international law, such that any state practice that resulted might be of limited relevance. In addition, such a decision could conflict with the position of an executive that is attempting to adopt a more modern position, resulting in inconsistent state practice.

### *1. Statutory Codifications of International Law*

This difficulty may be most acute in cases interpreting statutes that codify customary international law, or, more accurately, that codify a domestic auto-interpretation of customary law.<sup>203</sup> Even if legislation defining international law reflects contemporary customary international law at the time of adoption, customary international law subsequently could diverge a great deal from the

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*Autointerpretation*, in *SELECTED ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 167 (Alfred P. Rubin ed.) (1993).

<sup>202</sup> See CLIVE PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 96-97 (1965) (identifying these problems but discounting their seriousness); Daniel P. O'Connell, *The Relationship Between International Law and Municipal Law*, 48 *GEO. L. J.* 431, 454 (1960) (stating that English courts are limited in their power to neglect precedent and apply new or modified international law, so that English law and international law can take divergent paths). This latter difficulty apparently has been solved in English law; English courts are now free to discover what the prevailing international rule is and to apply that rule, regardless of domestic precedent. SHAW, *supra* note 27, at 109 (citing *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng. C.A.)).

<sup>203</sup> See Schrader, *supra* note 181, at 756-59. Under U.S. law, statutes supersede inconsistent customary international law, at least where the statute is unambiguous. See, e.g., *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 135-36 (2d Cir. 2005); *United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938-39 (D.C. Cir. 1988). In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004), the Supreme Court observed that Congress may "at any time" preclude the application of customary international law "by treaties or statutes that occupy the field." But see *NANDA & PANSIUS*, *supra* note 171, at § 9.5, suggesting without citing to authority, that where customary law changes following adoption of a statute, there may be an argument that international law limits the statute.

statute. At that point, cases construing the statute would have limited relevance as modern state practice. As previously mentioned, a potential example of such a statute is the Foreign Sovereign Immunities Act.<sup>204</sup>

Furthermore, a court attempting to determine the meaning of a term in a statute incorporating international law conceivably would be required to refer to customary international law at the time the statute was enacted.<sup>205</sup> Once again, such a decision could have limited relevance as modern state practice. This issue arose in connection with cases applying the ATS to international human rights claims. The question was whether courts, in determining what constitutes a tort against the law of nations, should refer to the law of nations when the forerunner to the ATS was adopted in 1789, or whether they should refer to modern international law.<sup>206</sup> The *Sosa* Court resolved the issue with a compromise: "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."<sup>207</sup> Before *Sosa*, most courts determined that courts must interpret international law as it applies in modern times, but there was contrary authority.<sup>208</sup>

## 2. *Judicial Precedent*

American courts may also consider themselves bound by American precedent in their application of customary international

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<sup>204</sup> See ERADES, *supra* note 111, at 952.

<sup>205</sup> See Schrader, *supra* note 181, at 758 ((citing *U.S. v. Enger*, 472 F. Supp. 490 (D.N.J. 1978)), construing a term in a 1790 diplomatic immunity statute in light of sources available to the drafters in the 18th century, works on international law by Grotius and Vattel).

<sup>206</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d at 881 (2nd Cir. 1980).

<sup>207</sup> *Sosa*, 542 U.S. at 725 (2004).

<sup>208</sup> See, e.g., *Filartiga*, 630 F.2d at 881 (2d Cir. 1980) (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796) for distinguishing between "ancient" and "modern" law of nations). Subsequent decisions treating the ATS cited this approach with approval. *But see* *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-16 (1984) (Bork, J., concurring) (referring to the law of nations when the precursor to the ATS was adopted in 18th century as crucial, if not determinative, to an understanding of the modern scope of the ATS).

law, and so may not look directly to international law. The district court in *Banco Nacional de Cuba v. Chase Manhattan Bank*,<sup>209</sup> for example, stated:

As a district court, we are not free to overlook or neglect the interpretation of international law reiterated a hundred times over in the American courts simply because some other nations in public debate and diplomatic correspondence have expressed a different view. While it is true that there is no international law, except to the extent that civilized nations having commercial intercourse with each other, agree that such law exists, and also agree to what it provides, this Court is bound by precedent and must recognize the precedential decisions of higher American courts unless and until withdrawn, set aside or reversed.<sup>210</sup>

In addition, courts may simply refer to American precedent because doing so is easier than attempting to discern international law through the traditional methods of international lawyers. Perhaps for similar reasons, courts routinely refer to the Restatement of Foreign Relations,<sup>211</sup> which sometimes reflects a particularly American view of international law.<sup>212</sup>

### *C. Cognitive and Logistical Difficulties of Employing Foreign Judicial Decisions*

In addition to the difficulties of knowing whether a particular court decision represents state practice, there are simple, mundane difficulties in referring to foreign legal decisions. These include the difficulties of actually understanding the context of individual decisions, the logistical difficulties for courts involved in reviewing foreign legal decisions, and the resulting temptation for courts to employ foreign decisions selectively.

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<sup>209</sup> 505 F. Supp. 412 (S.D.N.Y. 1980), *modified in part on other grounds*, 658 F.2d 875 (2d Cir. 1981), and *rev'd on other grounds sub nom.*

<sup>210</sup> *Id.* at 432; *see also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003) (holding that district court is obliged to accept international law as interpreted by the Supreme Court and Second Circuit).

<sup>211</sup> RESTATEMENT (THIRD), *supra* note 1.

<sup>212</sup> *Cf.* Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 VA. J. INT'L L. 33 (2003) (describing the role played by the views of American international law scholars in shaping the Restatement).



### 1. *Difficulties in Understanding Decisions From Other Legal Systems*

At first blush, it may seem that when foreign courts address matters of international law, there should be very little difficulty in understanding them because of the common international law subject matter. Nevertheless, different national legal and political systems may possess individual idiosyncrasies that make it difficult to assess national court interpretations of international law. Judicial decisions are a product of a particular institutional, doctrinal, political, and cultural context.<sup>213</sup> Outsiders are not likely to be aware of many of these factors. Taking an opinion at face value may “risk complete misunderstanding of its real meaning, its true importance.”<sup>214</sup> We have already seen how national transpositions of international law can create differences in national versions of international law.

In addition, rules of procedure, jurisdiction, the effect of precedent in a particular legal system, the composition and status of the court all may affect the “meaning” of a court’s decision.<sup>215</sup> For example, because the European Court of Justice does not include dissenting opinions, it may make support for a legal proposition seem stronger than it is.<sup>216</sup> There is no way to know whether a case was decided by a narrow margin or unanimously.<sup>217</sup>

The composition of a particular court may make a difference in how we understand its ruling.<sup>218</sup> Certainly, the members of courts in different countries will be affected by the culture of those countries. The members of some courts, moreover, may be more

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<sup>213</sup> See Krotoszynski, *supra* note 3, at 1335-36 (2006) (discussing the use of foreign precedent, primarily in the American constitutional context); Mark V. Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649, 662-63 (2004) (“We must be aware of the way in which institutional and doctrinal contexts limit the relevance of comparative information.”).

<sup>214</sup> See Krotoszynski, *supra* note 3, at 1335.

<sup>215</sup> See *id.* at 1340-41.

<sup>216</sup> See *id.* at 1341 (citing JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 56-57, 102-03 (Robert Badinter & Stephen Breyer eds., 2004)).

<sup>217</sup> See *id.*

<sup>218</sup> See *id.*

or less liberal or conservative than others. Think of the differences between the Ninth and Fourth Circuits in the United States.<sup>219</sup>

Another factor is the status of a court in a particular country's judicial system. A court's status in a country's legal hierarchy may affect the status of its decisions as state practice because they are provisional, subject to override by superior courts, as well as the political branches. Moreover, the opinions of certain judges and courts may carry more weight. In the United States, the decisions of certain appellate judges (Learned Hand, for example) and certain appellate courts may be more influential than others.<sup>220</sup>

## 2. *Judicial Capability and Logistical Difficulties*

Another disadvantage to considering judicial decisions as state practice is the relative lack of expertise in international law and international affairs possessed by most national court judges.<sup>221</sup> Personnel in the state organs that are involved in international affairs may be better trained and better informed than judges about international affairs and about the political ramifications of taking particular positions on legal issues. Of course, the legislature and state organs other than the foreign ministry (including the President) may also suffer from a lack of expertise, but that does not diminish the status of their acts as state practice.<sup>222</sup>

A more significant difficulty is a logistical one. Especially given the steep learning curve in international law matters, courts simply do not have the time to engage in surveys of state practice.<sup>223</sup> Indeed, courts rarely conduct surveys of state practice at all.<sup>224</sup> As Brownlie points out, "[a]n *ad hoc*, yet extensive,

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<sup>219</sup> See, e.g., Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1605-06 (2000) ("entire circuits seem to have ideological casts, with the liberal Ninth Circuit and the conservative Fourth Circuit currently perceived as being on opposite sides of the spectrum.").

<sup>220</sup> See, e.g., William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998) (employing statistical analysis of citations by U.S. Appellate Courts to demonstrate comparative influences of certain appellate courts and certain judges).

<sup>221</sup> See Trimble, *supra* note 163, at 713-16.

<sup>222</sup> See Akehurst, *supra* note 118, at 22 (discussing how the possible ignorance of the individuals in various organs does not affect the status of their acts as state practice).

<sup>223</sup> See BROWNIE, *supra* note 17, at 52.

<sup>224</sup> *Id.*

research project is out of the question, and counsel cannot always fill the gap . . . . In these circumstances it is hardly surprising that courts have leaned heavily on the opinions of writers.”<sup>225</sup> International courts and the courts of other nations do not routinely cite to national decisions as evidence of state practice, probably for this reason.

### 3. *Haphazard and Selective Use*

Related to these capacity and logistical difficulties are the dangers of haphazard and selective use.<sup>226</sup> Courts and lawyers searching for prior state practice in general, and national court decisions in particular, will find it difficult to conduct representative searches, both because of time and information costs.<sup>227</sup> Instead, they are likely to locate decisions that are more easily available, which will tend to be those of the developed countries.<sup>228</sup> For American courts, they are likely to be decisions in English, or at least decisions that have been translated. Furthermore, because of the difficulties of locating sources, there will be a temptation to simply cherry pick those cases that support a court’s predilection.<sup>229</sup>

### 4. *Making Foreign Decisions More Accessible*

Some commentators have suggested ways around these difficulties. In the context of constitutional interpretation, David Fontana has suggested existing mechanisms to make foreign decisions more accessible to American courts.<sup>230</sup> For example, Federal courts could appoint experts or special masters who could help them with international and comparative law matters.<sup>231</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> *See, e.g.,* Alford, *supra* note 233, at 64-69 (discussing the problems of haphazard and selective citation of foreign sources in constitutional interpretation).

<sup>227</sup> *See* Guzman, *supra* note 39, at 127.

<sup>228</sup> *See id.*

<sup>229</sup> *See generally* Richard A. Posner, *No Thanks, We Already Have Our Own Laws*, Legal Aff., July/Aug. 2004 (arguing that United States courts should not treat foreign or international rulings as precedent in decision making).

<sup>230</sup> David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 562-65 (2000).

<sup>231</sup> *Id.*

There are also sources for locating foreign court decisions, such as International Law Reports and a growing number of legal databases.<sup>232</sup> Further, increased education of judges could make them more aware of resources and methods for approaching foreign judicial decisions.<sup>233</sup> Perhaps these measures will help make foreign law more accessible and comprehensible.

### III. Conclusion

Treating national court decisions as state practice is one way that national courts can participate in transnational judicial dialogue. Indeed, there is little doctrinal justification against treating such decisions as state practice. Nevertheless, there are various difficulties in relying on national court decisions as evidence of custom, which suggests caution in their use and may dampen the prospects for a transnational judicial dialogue based on the creation of custom through national court decisions.

The practice of courts, the executive, and the legislature may be inconsistent, making it difficult to determine a state's ultimate position. In addition, national courts often refer to a national version of international law, rather than to customary law as practiced between states. For these reasons, it is extremely difficult to understand fully a decision from another legal system. Judges, who generally lack the expertise, language skills, and time to conduct surveys of state practice, may have great difficulty in understanding foreign decisions. As a result of these factors, and the difficulties of meaningful comparative analysis, interpreters may use foreign court decisions selectively, in a biased way.

These logistical difficulties may be ameliorated through greater training of judges and greater accessibility of foreign court decisions. In many cases, moreover, the basis of a foreign court's decision and its status as state practice may be clear. But the comparative task can be difficult for a capable expert,<sup>234</sup> and even

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<sup>232</sup> See SLAUGHTER, *NEW WORLD ORDER*, *supra* note 5, at 72 (noting the Lexis-Nexis and Westlaw databases, as well as the CODICES website, which collects and digests the decisions of constitutional courts around the world, *available at* [www.codices.coe.int](http://www.codices.coe.int)).

<sup>233</sup> See Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 66 n.71 (2004).

<sup>234</sup> Roger Alford mentions the possible assistance of increased judicial education about international and foreign law but argues that independent comparative

experts disagree about international comparative law.

